

10th CIRCUIT FINDS CHURCH LEADERS IMMUNE FROM SEXUAL HARASSMENT SUIT BY LESBIAN MINISTER

A unanimous panel of the U.S. Court of Appeals for the 10th Circuit ruled in *Bryce v. Episcopal Church in the Diocese of Colorado*, 2002 WL 797794 (April 30), that an established "church autonomy" doctrine under the 1st Amendment serves as a complete defense to a sexual harassment case brought against a church by a lesbian minister, where the plaintiff's case is based on offensive statements uttered in a theological context.

St. Aidan's Episcopal Church hired Lee Ann Bryce to serve as its Youth Minister in 1997. Bryce is not an ordained minister, but is a practicing Episcopalian Christian. She served successfully in that position, administering and leading the youth activities of the congregation. Bryce also served as an assistant music minister. On November 21, 1998, Bryce and her same-sex partner, Reverend Sara Smith, had a commitment ceremony at the First Congregation Church of Christ in Boulder. Smith has no association with either St. Aidan's or the Episcopal Church. Reacting to news of the commitment ceremony, the leaders of St. Aidan's informed Bryce that she would be terminated effective June 1999 because she was violating Episcopal doctrine, derived from the Lambeth Resolution, a document produced by an international conference of Episcopal bishops in 1998 that rejects same-sex marriage or any sexual relationship outside of marriage. The chief minister of the church, Rev. Donald Henderson, sent letters and memoranda to other church leaders and leading congregants discussing the situation, in which he referred to Bryce and Smith in language that they found offensive. The church convened four meetings of congregants to discuss the situation. Bryce had many vocal supporters at the meeting, but others made comments that she and Smith found offensive. Bryce was terminated in June of 1999.

She filed suit against the church and its leadership under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 1985(3), and 42 U.S.C. 1986. Smith, as co-plaintiff, also asserted claims under the two sections of 42 U.S.C. The case was assigned to U.S. District Judge Clarence Brimmer. As a member of an Episcopal Church in Cheyenne, Wyoming, Brimmer sua sponte raised the issue of whether he should recuse himself, but ultimately decided against recusal,

having concluded that "a reasonable person knowing all the relevant facts would not harbor doubts about his impartiality." Brimmer rejected a subsequent motion by the plaintiffs to reconsider his recusal decision. After defendants filed a motion to dismiss, Brimmer converted it to a summary judgment motion, giving both sides opportunity to supplement their submissions, and granted summary judgment in favor of the defendants, asserting that they are immune from suit on these claims as a matter of church autonomy.

Writing for the appellate panel, Chief Circuit Judge Tacha agreed with the district court's analysis. Citing U.S. Supreme Court cases running back more than a century, Tacha found that "Courts have held that churches have autonomy in making decisions regarding their own internal affairs. This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity." The main issue for analysis in this case was whether the statements that Bryce and Smith claimed were actionable fell within the confines of this autonomy doctrine, since churches remain liable for their non-religious activities. The question for the court is whether "the alleged misconduct is 'rooted in religious belief,'" citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a leading 1st Amendment case finding immunity for Amish teenagers from a state compulsory school attendance law.

Turning first to Rev. Henderson's correspondence about Bryce and Smith, and then to comments made at the four church community meetings, Tacha concluded: "The statements made at the church meetings, in Rev. Henderson's letters, and in materials Rev. Henderson attached to his letters may be offensive, and some of the statements may be incorrect, but they are not actionable. The defendants' alleged statements fall squarely within the areas of church governance and doctrine protected by the First Amendment." Henderson's letters were found to concern "an internal church personnel matter and the doctrinal reasons for his proposed personnel decision." The meetings were an attempt by the church to hold a serious religious dialogue. "At the time the offensive statements were made," wrote Tacha, Bryce was an employee of the church subject to its internal governance procedures. While churches do not operate above the law, we find that the dispute here 'is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law,'" and not a 'purely secular dispute' with a third party."

Although Smith is certainly a third-party in this respect, the court found that the church autonomy doctrine was sufficiently broad to shield the church against her claims as well. "The church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely," wrote Tacha. "The applicability of the doctrine does not focus upon the relationship between the church and Rev. Smith. It focuses instead on the right of the church to engage freely in ecclesiastical discussions with members and non-members. Rev. Smith voluntarily attended the four meetings and voluntarily became part of St. Aidan's internal dialogue on homosexuality and Bryce's employment." The court noted that references to Smith in Rev. Henderson's letters might not enjoy quite the same level of 1st Amendment immunity, but still the references to Smith were made only in passing in talking about Bryce, and were made "in the context of an internal church dialogue."

The court found that the statements, while objectionable to Smith, "were neither libel of Smith with actual malice nor a public disclosure of intimate matters that had previously been private." Once again, the court found that the letters did not relate to a purely secular dispute, and thus could not be actionable.

The court also rejected the argument that Judge Brimmer should have recused himself, finding that the courts had overwhelmingly rejected the argument that membership in an organization or group automatically disqualifies someone from sitting as a judge in a case where that group might be involved as a party. The court noted a case of a Jewish judge sitting in litigation between Jewish and non-Jewish groups, as well as cases rejecting challenges to judges based on their church memberships. A.S.L.

LESBIAN/GAY LEGAL NEWS

Sodomy Litigation Yields Mixed Results

Efforts to eliminate state laws prohibiting consensual sodomy continue, although with mixed results.

In *Devescovi v. Ventura*, 2002 WL 480972 (March 20), a federal district court in Minnesota confirmed that the decision in *Doe v. Ventura*, 2001 WL 543734 (May 15), in which the Hennepin County court declared the state's

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Circulation: Daniel R Schaffer, LEGALNY, 799 Broadway, Rm. 340, NYC 10003. 212-353-9118; e-mail: le-gal@interport.net

LeGal Homepage: <http://www.le-gal.org>

Law Notes on Internet: <http://www.qrd.org/qrd/www/usa/legal/Igln>

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\$55/yr by subscription

Canadian Rate \$60; Other Int'l Rate US\$70

ISSN 8755-9021

May 2002

sodomy law unconstitutional, is binding throughout all counties in Minnesota. The court emphasized that prosecutions under the criminal code are brought on behalf of the state, and reiterated that counties are merely “organized as political subdivisions of the state for governmental purposes.” Therefore, district attorneys in all counties, and not merely Hennepin County, were bound by the judgment in *Doe*. Turning then to the case before it, the court dismissed as moot the challenge to the constitutionality of Minnesota’s sodomy law raised in *Devescovi*, as the issue had been definitively resolved by *Doe*.

Advocates in Louisiana, however, experienced another setback in their efforts to strike down the state prohibition on consensual sodomy. The initial proceedings in the case inspired some optimism. In a civil challenge to the sodomy provision, Judge Carolyn Gill-Jefferson declared the state’s sodomy law unconstitutional on the grounds that it violated the state constitutionally protected right to privacy. While the case was on appeal, the Louisiana Supreme Court rendered its decision in *State v. Smith*, 766 So. 2d 501 (La. 2000), rejecting a challenge to the constitutionality of that state’s sodomy laws in the context of a criminal prosecution. Shortly thereafter, the court remanded the civil case for reconsideration in light of *Smith*. Notwithstanding the decision in the criminal case, Judge Gill-Jefferson reiterated her decision that the state’s sodomy law violated the constitutionally protected right to privacy, but rejected the seven other grounds offered by the plaintiffs for invalidating the statute.

An appeal was originally taken to the intermediate court, but the case was transferred to the Supreme Court for resolution of this conflict. In a per curiam decision, *Louisiana Electorate of Gays & Lesbians, Inc. v. State*, 2002 WL 481336 (March 28), the Supreme Court insisted that it had “squarely rejected the assertion that the privacy clause of the Louisiana Constitution protects oral and anal sex” in *State v. Smith*. Expressing its apparent displeasure, the court observed that “[d]espite the clarity of our holding to this effect, the district court chose to depart from *Smith* and reached a contrary result on the law. This action involves, at least, a failure by the lower court to recognize its obligation to follow the law of this State as pronounced by this court.” Accordingly, the Supreme Court reversed Judge Gill-Jefferson’s decision with regard to the privacy arguments, but remanded the case to the court of appeals for a determination of whether any of the other grounds for relief asserted by the plaintiffs had merit.

In a brief opinion concurring in part and dissenting in part, Chief Justice Calogero agreed with the general proposition that lower courts must follow the binding precedent of the state’s

supreme court, but reiterated his disagreement with the underlying ruling in *Smith* and called upon the court to revisit its decision. *Sharon McGowan*

In another setback in sodomy litigation, the Texas Court of Criminal Appeals has refused to review the decision by an en banc panel of the intermediate appellate court rejecting a challenge to the state’s sodomy law arising from an actual prosecution. In *Lawrence v. State of Texas*, 41 S.W.3d 349 (Tex. Ct. App., 14th Dist. 2001), a local prosecutor went after two gay men who were apprehended having sex in their home after police broke in while responding to a man-with-a-gun report. A three-judge panel of the intermediate appellate court found the Texas sodomy law unconstitutional on state grounds, but was reversed by the en banc panel, which prominently cited to *Bowers v. Hardwick*. The refusal by the Court of Criminal Appeals (the highest court in the state for appeals in criminal prosecutions) to review the case on the merits leaves the door open to a possible U.S. Supreme Court appeal, since federal grounds were also asserted at the trial level for arguing that the statute cannot be used against private, consensual sex between adults. The Texas law targets only same-sex conduct, thus presenting an ideal target for an equal protection challenge, and imposes only misdemeanor penalties. (The Texas law has provoked numerous constitutional challenges over the past thirty years, but seems to have the proverbial nine lives, having survived several judicial declarations of unconstitutionality.) A.S.L.

Supreme Court Strikes Federal Ban on Virtual Child Pornography

Voting 6–3, the U.S. Supreme Court ruled on April 16 that certain provisions of the Child Pornography Prevention Act of 1996 (CPPA) violate the 1st Amendment’s protection for freedom of speech and the press. *Ashcroft v. The Free Speech Coalition*, 2002 WL 552476. The Court’s ruling is just the latest in a string of judicial rebuffs to attempts by Congress to interfere with the rights of American residents to receive non-obscene depictions of sexual activity; previously, the Court struck down several attempts at prohibiting or regulating sexually-explicit content on the internet, as well as a federal law attempting to make phone-sex lines relatively inaccessible.

In this case, the challenged provisions made it a criminal federal offense, subject to severe penalties, to produce or possess “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be, of a minor engaging in sexually explicit conduct.” The law would apply regardless whether all the persons pictured are adults, so long as at least one of them “appears to be” a minor. Another

challenged provision would prohibit any sexually-explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression [that it depicts] a minor engaging in sexually explicit conduct,” the so-called “pandering” provisions.

Writing for the Court, Justice Anthony Kennedy found both provisions to be offensive to the 1st Amendment. After noting the chilling effect that the severe penalties in this statute would have on “legitimate movie producers or book publishers,” Kennedy noted two recent, highly-praised films which appear on their face to subject the producers, distributors, and anyone possessing a home video or DVD, to criminal prosecution under the statute: *Traffic*, nominated for the Academy Award for Best Picture in 2001, and *American Beauty*, which won the Best Picture Oscar in 2000. In both of these films, Justice Kennedy observed, there are scenes which appear to depict minors engaging in sexual activity.

“Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young,” wrote Kennedy. “Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute’s prohibitions. If these films, or hundred of others of lesser note that explore these subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work’s redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene.”

Justice Kennedy notes that existing laws previously upheld by the Court already penalize production, distribution or possession of obscene works, or works depicting sexual activity produced using underage actors. The rationale for letting the state criminalize non-obscene pornography involving real children is to protect those children from exploitation, but the Court incidentally also acknowledged the misuses to which such pornography can be put by pedophiles seeking to seduce children as another justification for such laws. In this case, however, the Court was unwilling to extend this secondary justification to vindicate Congress’s most recent adventure. Kennedy insisted that “the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber* [the case upholding

criminalization of actual child pornography]. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”

Invoking the frequently iterated principle that “speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it,” Kennedy acknowledged the strong interest of the government in protecting children, but concluded that this statute crosses the line of acceptability. “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it,” he wrote. “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”

In a concurring opinion, Justice Clarence Thomas noted one of the government’s unsuccessful arguments in support of the statute: that advances in technology were making it possible for pornographers to produce apparent child pornography through computer-generated images that were virtually indistinguishable from the real thing. Justice Kennedy had rejected out of hand that this justified criminalizing pornography that did not involve children in its production so as to eliminate a potential evidentiary problem in the prosecution of purveyors and possessors of “real” child pornography. Thomas, by contrast, wants to keep that door open, writing: “technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.”

Justice Sandra O’Connor would only go so far with the Court majority, joining in striking down the criminalization of material that “appears to be” of minors although made with youthful-looking adult actors, but would uphold the rest of the statute, along with dissenting Chief Justice William Rehnquist and Justice Antonin Scalia. In his dissent, Rehnquist argued that it was possible to interpret the statute in such a way as to limit its application to obscene material and computer-generated images that are “virtually indistinguishable from real children engaged in sexually explicit conduct,” which he believed could be constitutionally criminalized.

The decision marks a major victory for freedom of speech and expression about sexual

ideas, and an important rejection, by a relatively conservative Court, of Congress’s continued impulse to skirt First Amendment principles in its rush to vote to condemn the sexually-explicit communication abhorred by the politically powerful religious right-wing in this country. A.S.L.

Lesbian’s Harassment Case Revived by California Appeals Court

In an unpublished opinion with limited precedential value, the California Court of Appeal reinstated the sexual harassment and discrimination suit brought by a lesbian field service technician against Pacific Bell. *Croshier v. Pacific Bell Telephone Company*, 2002 WL 596796 (Cal. App. 4th Dist., April 18). The court agreed, however, that the plaintiff’s claim of retaliation was unsupported by the evidence and that the district court properly rejected her request for punitive damages.

Pacific Bell hired Debra Croshier to work as a field service technician in 1978. The garage out of which she worked was staffed mostly by men, who harassed her continually because of her gender and sexual orientation. Although she apparently filed her first formal complaint with the Department of Fair Employment and Housing (DFEH) in 1991, Croshier filed another harassment-based complaint with the DFEH in March 1997, which resulted in the issuance of a right to sue letter. Shortly thereafter, Pac Bell issued a memorandum to its service technicians, explaining that the company would not tolerate harassment, discrimination or violations of its graffiti policy.

In September 1997, Croshier entered into a confidential settlement with Pac Bell, pursuant to which Pac Bell would pay Croshier compensation, provide her with a parking space that was near the entrance of the garage and within the visual range of a security camera, and change her work shift to 8:00 a.m. to 4:30 p.m. Although Pac Bell declined to include a specific provision in the settlement agreement requiring it to transfer Javier Ramirez, a supervisor who was “a key instigator” in the harassment and discrimination against Croshier, Pac Bell in fact transferred him before Croshier signed the agreement. For her part, Croshier agreed to release Pac Bell from any and all claims arising from her employment prior to the date of the agreement and agreed that she would “not be permitted ... to bring into evidence in any forum[,] any action of conduct by [Pac Bell], or any of its employees, which occurred prior to the date of the execution of the agreement.”

Within a few months after signing the agreement, another employee parked in Croshier’s parking spot on two occasions. When she complained, however, her supervisor told her simply to park somewhere else, and neither reprimanded nor disciplined the other employee.

Around the same time, someone spit on Croshier’s car, but the culprit was never identified because Pac Bell’s security camera was apparently not operational at the time. After the second parking spot incident, Croshier commented to a coworker that “some asshole” had parked in her spot. Another technician overheard Croshier’s remark and reported her for using foul language. Although the use of crude language, including curse words, was apparently commonplace at the garage, Croshier’s supervisor wrote her up for making the comment. That same month, Croshier received an adverse evaluation based in part on “unacceptable attendance” because she worked 7.5 hours rather than 8 hours on New Year’s Eve, even though she had requested the time off.

In February 1998, a Pac Bell area manager told Croshier that Ramirez was going to be transferred back to Croshier’s garage. She protested, noting that his transfer was an integral part of her settlement with Pac Bell, and insisting that his return would be very detrimental to her. The manager responded by suggesting that maybe Croshier should not have signed the settlement agreement. The next day, however, after speaking to the supervisor, the manager apologized to Croshier and told her that Ramirez would not be reassigned to her work site. Croshier suffered numerous other incidents of harassment over the next eighteen months. Sometime between February and May 1998 the rearview mirror on her car was pushed in, but the culprit once again went unidentified because, even though Croshier had reported the incident right away, her supervisor did not act on the complaint for several days, and at that point, the security video for the relevant time period had been recorded over. In June, Croshier found pages from a Penthouse magazine and a telephone directory containing handwritten derogatory comments about her and her sexual orientation. In response to Croshier’s complaint, Pac Bell used a handwriting expert to identify the perpetrator, although he vigorously denied any involvement in the incident. After this incident, Croshier took stress-related medical leave. Even then, however, the harassment apparently did not cease because in August 1998, she received an unsolicited mailing from a casket company, which she perceived as a death threat. That month, Croshier filed a DFEH complaint regarding the June incident, and received a right to sue letter.

When Croshier returned to work in September, she discovered that most of her tools were missing, and her assignments had been changed from predominantly repair jobs to predominantly installation jobs. She complained to her supervisor about being treated differently from the other three male technicians, who primarily had repair work. Although the supervi-

sor claimed that the assignments were made randomly, he changed her workload for a short period of time, giving her more repair work. Beginning in January 1999, Croshier began finding graffiti of a sexual nature (e.g., two men having anal sex and/or containing expletives) at a number of Pac Bell's terminal boxes in the area. Although none of her coworkers apparently reported the graffiti, in response to Croshier's reports, Pac Bell supervisors went to each of the sites, took pictures of the graffiti and painted over it. In March 1999, someone wrote "The Bitch #114" in a terminal closet, apparently a reference to Croshier's technician identification number. As a result of this incident, Croshier again took stress-related medical leave. Pac Bell's retained handwriting expert claimed that he was unable to identify the culprit. As a result, Pac Bell simply instructed its supervisors to discuss the anti-graffiti policy with their work groups. In May, Croshier filed another complaint for harassment and retaliation with the DFEH, which issued her a right to sue letter.

When she returned to work in July, Croshier requested a transfer due to Pac Bell's apparent inability to control the harassment occurring at the garage where she was stationed. Pac Bell conceded to this request and transferred her to a communications technician position at a site much farther away from her home. Prior to her transfer, a male supervisor escorted Croshier to her van so that she could retrieve her tools, and then took the van keys from her and escorted her off the premises. Although the new position had a higher wage scale than the service technician position, the job allowed for no overtime work, which significantly decreased Croshier's earnings. Although the new working environment was far more hospitable, the position was less desirable not only because of the lower earning potential but also because it did not provide Croshier with the opportunity to work outside or use her hands as she did while doing repair and installation work. In November 1999, Croshier filed suit against Pac Bell, alleging sexual discrimination, harassment and retaliation in violation of California's Fair Employment and Housing Code (FEHC), sex discrimination in violation of the California constitution, intentional infliction of emotional distress, breach of contract and of the implied covenant of good faith and fair dealing in violation of public policy and certain California Labor Code provisions. Several months later, Croshier filed a claim with the DFEH, alleging that she had been harassed on the basis of her gender and sexual orientation, retaliated against for filing a prior complaint, and discriminated against as to work assignments. At Croshier's request, the DFEH issued her an immediate right to sue letter.

In response to Pac Bell's motion for summary judgment, the trial court noted as a preliminary

matter that Croshier was barred by the settlement agreement from introducing any evidence of harassment and discrimination that occurred prior to September 1997. Turning then to the merits, the court found that Croshier had demonstrated no triable issue of fact as to the existence of harassment "sufficiently severe or pervasive" as to alter the conditions of her employment. The court likewise discredited her discrimination claim based on the work assignments or her being escorted to retrieve her tools, but found that there was a triable issue of fact as to whether Pac Bell's reprimand of Croshier and failure to investigate adequately the graffiti incidents were discriminatory. The court rejected her claim that her working conditions were so intolerable as to support a constructive involuntary transfer claim, while acknowledging that there was a triable issue of fact as to whether her reprimand was retaliatory, and threw out the intentional infliction of emotional distress count and her claim for punitive damages. As a result of these rulings, only Croshier's claims for discrimination and retaliation remained for trial. After considering Pac Bell's motions in limine, the trial judge indicated that Pac Bell's investigative efforts did not constitute discrimination as a matter of law, and that any claim arising out of the 1997 reprimand was barred by the statute of limitations. Finally, the trial judge ruled that the reprimand was not subject to equitable tolling under the continuing violations doctrine because it was not part of a systemic pattern of discrimination or series of related discriminatory acts. As a result of these rulings, the trial court granted judgment in favor of Pac Bell.

The court of appeals first determined that, because Croshier filed suit in November 1999, the May 1999 right to sue letter, rather than the "expired" August 1998 letter was the appropriate document to consider for purposes of calculating the one-year statute of limitations. Therefore, the court observed that, without the benefit of any equitable doctrines, Croshier was entitled to seek recovery for conduct starting in May 1998. With regard to the continuing violations doctrine, however, the court noted that "it is necessary to look at the employer's conduct within, as well as prior to, the limitations period, to determine whether its actions as a whole were sufficiently similar in kind and of such frequency to constitute a continuous course of conduct." Although some of the pre-May 1998 incidents, such as the parking spot incidents, "appear at first blush to be fairly innocuous," the court noted that they must be considered in light of all of the circumstances.

After reviewing the record, the court found that the evidence was sufficient to permit a reasonable trier of fact to conclude that Pac Bell's responses to the pre-May 1998 incidents were similar in kind to its responses to the incidents of increasing severity that occurred within the

limitations period, and that the incidents occurred with sufficient frequency as to trigger the application of the continuing violations doctrine to the pre-May 1998 conduct. Therefore, in reviewing the summary judgment motion, the court considered pre-May 1998 conduct as well.

With this history of conduct available for its consideration, the court found that a reasonable trier of fact could conclude that the incidents created a hostile work environment. Furthermore, it found that the evidence was sufficient to create triable issues of fact as to the existence of harassment and whether Pac Bell failed to investigate or address the incidents properly. The court rejected Pac Bell's argument that Croshier had failed to prove that Pac Bell had treated her differently than it would have treated a male or a heterosexual, and reiterated that the amount of evidence required to make a prima facie showing in a discrimination case poses only a "minimal evidentiary burden" on the plaintiff, a burden that Croshier had satisfied in this case. Based on its analysis of the harassment and discrimination issues, the court also reinstated Croshier's claims of intentional infliction of emotional distress and violation of public policy.

The decision was not, however, a total victory for Croshier. The appellate court ruled that Croshier failed to present adequate evidence to support a claim of retaliation, and affirmed the grant of summary judgment on that count. The panel also found that Croshier had not demonstrated that her supervisors were "managing agents" of Pac Bell, and therefore an award of punitive damages against the company would be inappropriate. Even assuming that the supervisors were managing agents, however, the court further ruled that the evidence in this case did not support the conclusion that Pac Bell's conduct was "oppressive, malicious or fraudulent," so as to support a claim for punitive damages. *Sharon McGowan*

Federal Court Grants Summary Judgment Against Discharged Lesbian High School Principal

U.S. District Judge Curtin (W.D.N.Y.) granted summary judgment in favor of the Jamestown Teachers Association (a union), finding in a March 17 opinion that the union had effectively rebutted Janita K. Byars' prima facie case of sex discrimination under Title VII of the Civil Rights Act of 1964. *Byars v. Jamestown Teachers Association*, 2002 WL 553717. Byars, a lesbian, claimed that she was forced out of her position as high school principal by a conspiracy among the teachers union, individual teachers, and various administrators in the school district. While the court found that Byars had alleged a prima facie case of sex discrimination, it concluded that evidence of the union's com-

licity in Byars's discharge was insufficient to withstand the motion.

Byars was appointed principal of Jamestown High School beginning in September 1994 for a three-year term. She would be considered for a tenured appointment in the spring of 1997. According to affidavits submitted on her behalf in this litigation by some of the teachers, Byars was immediately disliked by some of the "old guard" of male teachers, both at the school and in the leadership of the local teachers union, who objected to a female principal (and, in some cases, particularly to one who was a lesbian).

After having received positive evaluations her first two years, Byars found herself under attack during the third year, with "unrest" among teachers such that an outside review team was brought in by the state teachers association. This team issued a report to members of the school district administration recommending the discharge of Dr. Byars when her term was up. But Byars was informed by her administrative supervisor, before this report was issued, that the board of education would probably vote to deny Byars tenure. After receiving this message, Byars arranged to tape her next class.

Byars claimed that the union had instigated her dismissal, and introduced testimony from some other teachers describing the exultant reaction of certain strong union supporters to the board's decision.

Byars sued both the teachers union and the school district. The school district settled her case for an unreported amount. In this opinion, Judge Curtin was addressing the union's motion for summary judgment. Curtin found that the normal analytic method of analyzing Title VII claims could not be pursued in this case, because of the peculiar nature of the facts. It seems that Dr. Byars was told before the union issued its report (which was subsequently leaked to the press and published in the local newspaper) that the board of education would not appoint her, thus vitiating the claim that it was the union that procured her discharge.

Judge Curtin found the affidavits by Byars' supporters to be too non-specific to be of any help in the litigation, and turned to recent precedents to try to assemble the elements of a prima facie case, on a subject as to which there has been very little actual litigation. The court concluded that Byars had pleaded a prima facie case of sex discrimination, but that the resulting inference of discrimination had been effectively rebutted by the school district's articulated reasons for refusing to terminate Byars' appointment. The school district, a co-defendant, had settled the suit against it for an undisclosed sum, leaving the teachers union as the only defendant still in the case.

Judge Curtin found that Byars had failed to present sufficient specific allegations of sexism

to survive the motion. Byars had also sought to assert a sexual orientation discrimination claim in this case, but failed to bring in any witnesses to the extent to which there was actual discrimination based on sex. (The sexual orientation claim was politely deferred by Judge Curtin in light of the emerging consensus among many judges the intra-community disputes are not worth being taken seriously by the exalted state court. A.S.L.)

Public Employee's Same-Sex Harassment Claim Under 42 USC 1983 May Proceed Against Persecutors

U.S. District Judge Allen G. Schwartz (S.D.N.Y.) has allowed a case of same-sex sexual harassment to proceed to trial. The suit, brought under 42 U.S.C. §§ 1983 (a Reconstruction-Era statute intended to enforce constitutional rights), alleges that the posting on Officer Frank Emblen's locker and other places of computer-altered depictions of Emblen engaging in homosexual or sadomasochistic practices violates Officer Emblen's civil rights, even though it was agreed that Emblen is not gay. (Whether he is a sadomasochist is not stated.) The purported reason for the harassment was Emblen's non-masculine behavior, but nothing in the opinion specifies what acts comprised that behavior. Judge Schwartz agreed with Emblen that, if the charges were proven, the individual officers responsible for the depictions would be liable under sec. 1983. *Emblen v. Port of New York/New Jersey Authority*, 2002 WL 498634 (March 29, 2002).

Ruling on a motion by the defendants for summary judgment, Judge Schwartz first determined that the doctrine of respondeat superior was not applicable. The Port Authority could only be liable if the officers were acting to effectuate a *de jure* or *de facto* policy or custom of the employer, or if the officers who engaged in harassment were in a policy-making position. None of these conditions existed.

Individual defendants who directly engaged in the harassment could be liable if they were acting under color of state law. *Hudson v. New York City*, 271 F.3d 62 (2d Cir. 2001). Because the defendants had supervisory authority over Emblen, and Emblen's action is based in part upon the failure of each defendant to supervise properly, each of the individual defendants acted "under color of law" for purposes of sec. 1983.

Section 1983 is intended to provide a vehicle for federal court enforcement of constitutional rights. Emblen claimed a violation of his 14th Amendment right to equal protection of the law. Judge Schwartz cited cases holding that sexual orientation discrimination may be the basis for an equal protection claim. *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347 (E.D.N.Y.1999) (holding that the Supreme

Court in *Romer v. Evans*, 517 U.S. 620 (1996) "established that government discrimination against homosexuals, in and of itself, violates the Equal Protection Clause"); *Tester v. City of New York*, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997). That Emblen is not homosexual — thus is not a member of a "protected class" — is irrelevant, because "the equal protection guarantee also extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials." *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494 (2d Cir.2001).

After determining that the harassment was severe and intimidating, and not merely misconceived vulgar fun, Judge Schwartz went on to hold that a reasonable juror could find three of the defendants guilty of discriminatory harassment. However, their superior officers could not also be found guilty on a respondeat superior theory. Summary judgment was denied for three defendants, and the case may proceed to trial. *Alan J. Jacobs*

Federal District Court Rejects Tort Claims Premised on Prosecutory Homophobia

The U.S. District Court in Maryland dismissed a suit by two gay men, Jeffrey Bruette and Brian Kuehn, who had videotaped a 17-year-old boy having sex with their dogs in their basement three times, allegedly to help him get counseling. Bruette and Kuehn charged that the police, acting out of homophobia, had them charged with an assortment of child abuse and pornography crimes. *Bruette v. Montgomery County, Maryland*, 2002 WL 471302 (D.Md., March 26). They pled guilty to reduced charges, were sentenced to probation and/or community service, and then sued a police officer and the county government for unlawful arrest, malicious prosecution, and denial of due process and equal protection.

Bruette and Kuehn had told the police that in the summer of 1998, J.C. spent many hours at their home "due to his troubled home life" and they tried to provide "an alternative, positive environment." Bruette and Kuehn told J.C. they were gay and he said "it didn't matter to him as long as it didn't involve him." They told J.C.'s mother that she was welcome to check on J.C. at anytime as he spent a lot of time at their home. Bruette and Kuehn told the police that after they had Sparky, their male German Shepard neutered, J.C. was upset.

In January of 1999, Bruette and Kuehn purchased a 'pin hole' surveillance camera with "no specific need or intention for it." After they suspected J.C. of stealing equipment in the basement, they set up a "nannycam." While watching on their television they "inadvertently" saw J.C. masturbate on Sparky, undress and try to mount him. After Sparky resisted, J.C.

laid on Abby, a female Golden Retriever, and ejaculated on her. They subsequently videotaped similar acts over the next two days. After confronting J.C., he denied and then admitted having sex with the dogs. A friend of theirs suggested that teen bestiality is frequently found where there is sexual abuse. In front of his parents, J.C. denied having sex with the dogs.

Five months later, after they said J.C.'s parents wouldn't address his conduct, they went to the police also that there would be a clear record of the events." Bruette and Kuehn also showed the video to a friend. In a police interview, J.C. said he had sex with the dogs "because he wanted to know what it was like to be homosexual." During police interviews, Bruette and Kuehn were asked about their homosexuality and whether they had sex with J.C., which they denied. Bruette told the police that "somehow this situation is getting totally misconstrued" and that the "real focus should be on dealing with J.C.'s issues."

Among Bruette and Kuehn's claims were unlawful arrest, malicious prosecution, denial of due process and equal protection of the laws. Judge Motz dismissed all but one claim, as probable cause for prosecution existed. Judge Motz noted that they videotaped J.C. three times, "unnecessarily" showed the tape to a friend rather than a counselor, and went to the police after five months when "they had reason to believe that someone, particularly J.C.'s family, might complain to the police about their own conduct." The only point on which Bruette and Kuehn prevailed was that a possession of child pornography charge applied to children under 16. Judge Motz wrote that "experience demonstrates that people who are generally kind and gentle by nature can commit illegal acts. Further, an ambivalence in action sometimes reflects an ambivalence in intent." Judge Motz noted that the Maryland Court of Special Appeals "has indicated that the existence of probable cause would preclude any state constitutional or tort claims regardless of the police officer's subjective intent." *Thacker v. City of Hyattsville*, 762 A.2d 172, 184 (Md. Ct. Spec. App. 2000). Bruette charged that his lawyer was not allowed to view the videotape to determine whether J.C. penetrated the dogs. Judge Motz found that this claim was only relevant to the charge that Birch coerced him to give the dogs to his parents by threatening animal cruelty charges. Bruette was seeking to get back various equipment used in taping J.C. *Daniel Schaffer*

Internet Vice Sting Snares Air Force Captain

Despite the testimony of three officers and a finding of apparent unlawful command influence by a U.S. Air Force Court Martial, a three-judge panel of the U.S. Air Force Court of Criminal Appeals was convinced beyond a reason-

able doubt that unlawful command influence, if any, did not prejudice the proceedings against a male captain convicted of, inter alia, attempt to entice a male minor to engage in sexual activity. Accordingly the court affirmed the sentence of dismissal from the service, two years confinement, and total forfeiture of pay and allowances. *United States v. Filipkowski*, 2002 WL 496453 (A.F.Ct.Crim.App., March 29).

A 1999 court martial convicted Captain Vincent Filipkowski under 18 U.S.C. 2422(b) of using a facility of interstate commerce to attempt to entice what he believed to be a 15-year old boy into a sexual encounter, according to the record. Filipkowski, on Christmas leave in Florida, exchanged Instant Messages (IM) in a pmen for men" Internet virtual chat room with a person called "OUTDRBOYFL", self-identified as a 15-year-old. After lengthy IM exchanges described in the opinion as "full of sexual references and innuendo" and "includ[ing] very explicit sexual matters," OUTDRBOYFL and Filipkowski "agreed to meet" at a retail store. On his arrival at the store, Filipkowski was arrested by police from Central Florida's Child Exploitation Task Force, who had created the OUTDRBOYFL identity. Filipkowski made a statement to the police that "he only intended to counsel the boy, because he seemed confused about his sexuality... add[ing] that 'he wasn't even horny,' because he had met an 18-year-old male on line the night before, and had oral sex with him... [and] that [Filipkowski] was a homosexual."

Filipkowski challenged the legal and factual sufficiency of the evidence against him, contending both that he lacked specific intent to commit the offense and that the police had entrapped him. The Court of Criminal Appeals found Filipkowski's argument, that the "culture of skepticism" in the fantasy world of Internet conversation was such that he did not believe that OUTDRBOYFL was really a 15 year old, unpersuasive. The court, citing "the explicit nature of the sexual discussion," discounted Filipkowski's contentions that he went to meet OUTDRBOYFL just to go shopping or to serve as a mentor for an obviously troubled young man.

The court also rejected Filipkowski's allegation of entrapment. Although not charged with oral sodomy in violation of 10 U.S.C. 925, the court determined from Filipkowski's admission to police regarding the 18-year-old that "the appellant was predisposed to use the Internet to set up meetings with other males for sexual relations."

Reading Senior Judge Breslin's opinion (for a panel of three) against a national backdrop in which some religious authorities have sought to equate homosexuality with pedophilia, and acquainted with the phenomena of mature LGBT people attempting to counsel the confused

without improper motives, your author's suspicions were raised by the way in which the opinion summarizes the IM sexual "references" and "innuendo" without attributing them either to Filipkowski or the police. Ultimately however, the reader must take at face value the appellate court's conclusion that the "officers were skillful in pressing the appellant to declare what he wanted without first suggesting what that should be."

In 1999, after the detachment commander, Colonel Bogenrief, brought charges against Filipkowski and read a summary of the charges to unit personnel, Filipkowski sought character witnesses among his fellow service-members. During this period Bogenrief commented at a staff meeting attended by 10 to 15 people that Filipkowski was a "dick-sucking weasel." The comment spread among detachment members, but Judge Breslin's opinion assures us, "It was intended to describe people who were opportunistic and self-serving, rather than anything relating to sodomy." In a later discussion among detachment leaders, referring to Filipkowski's leave to retrieve his car from Florida authorities, Bogenrief advised Filipkowski's supervisor to "keep an eye" on him because "he might run his car into a bridge abutment." Smiling, Bogenrief added that it might save them all some bother. Rumors of this comment also spread to members of the detachment.

Shortly before trial Filipkowski's appointed counsel learned of these comments and advised prosecutors of their intent to raise the issue of unlawful command influence. Unlawful command influence exists where a commander's conduct "attempt[s] to coerce or, by any unauthorized means, influence the action of a court-martial ... in reaching the findings or sentence in any case." 10 U.S.C. 837. "In an excess of caution" (per the opinion), the government then arranged for Bogenrief to inform unit members that Filipkowski was "innocent until proven guilty," and that, if they chose, they were free to assist the defense without fear of reprisal.

The Court of Criminal Appeals accepted Military Judge Amy Bechtold's factual findings that the testimony of Captain Julie Plummer and Lieutenant Colonel Samuel Walker, and evidence regarding a sergeant, established that Bogenrief's "sometimes dictatorial" style created in the three a real fear of reprisal for assisting Filipkowski's defense. (Bechtold found no unlawful command influence in a second Lt. Col.'s testimony.) The court, however, held that Bechtold's conclusion that these fears established "apparent unlawful command influence" was erroneous. Characterizing the fear as mere speculation, the court held "that a reasonable person who was aware of all the facts would [not] conclude that the system was unfair." The court reasoned that, even if unlawful command influence existed, it was fully remedied by

Judge Bechtold's actions and did not affect the outcome. Bechtold had ruled that she would grant any motion to compel the production of any witness from the unit, ordered the command staff excluded from the courtroom and its environs, directed trial counsel to offer a point of contact for all defense witness in the event they felt they were victims of reprisal, and ordered a unit meeting where trial counsel informed unit members of their right to cooperate. At sentencing the defense presented 25 statements of Filipkowski's good character, including two from unit members.

Captain Filipkowski, an 11 year veteran who worked on highly-classified communications satellite projects, also challenged the severity of his sentence. In addition to the conviction for attempted sexual enticement of a minor, the sentence was imposed for disobeying a superior's lawful order and negligent dereliction of duty. The two latter convictions are based on Filipkowski's use of his Air Force computer to maintain statistics for a fantasy football league. An audit revealed that Filipkowski had opened fantasy football spreadsheets during duty hours 258 times after being warned not to, such spreadsheets remaining open for up to four hours a day. *Mark Major*

Fake Letter to the Editor Held No Basis for Gay Man's Libel and Privacy Claims Against Newspaper

Although previously published in the Media Law Journal, this case just recently popped up in Westlaw even though the decision is dated March 15, 2001. The plaintiff, John Dominick, asserted claims against defendant, The Index Journal Company, for negligence, libel, invasion of privacy and intentional infliction of emotional distress after the defendant published a letter to the editor attributed to Dominick advocating that the community be more receptive and open to gays and lesbians. The letter indicated that Dominick had recently attended gay and lesbian celebrations in Myrtle Beach and Disney World where the local community and local merchants had welcomed the celebrants with open arms. The letter questioned why the local community could not be as receptive to gays and lesbians. *Dominick v. The Index Journal Company*, 2001 WL 1763977, 29 Media L. Rep. 2329 (S.C. Comm. Pleas Ct., March 15, 2001).

The day the letter was printed, Dominick contacted William Collins, the Executive Editorial Director of defendant, and told Collins that he was not the author of the letter and outraged that the newspaper had attributed the letter to him. When the letter arrived at the paper, Collins reviewed the letter. The newspaper prints letters to the editor that "contribute ideas and comments on current topics." In addition, each letter must be signed and a correct ad-

dress for the author given. Collins thought the letter was appropriate for publication. The letter was signed (indicating that Dominick was the author) and Collins verified through local records that the address given in the letter belonged to Dominick. Collins did try to reach Dominick by telephone prior to publication, but his attempts were unsuccessful.

Upon learning that Dominick was not the author of the letter, Collins printed a correction in the following day's newspaper. Thereafter, Dominick commenced a lawsuit against the newspaper. In discovery, Dominick stipulated that he was gay. Deposition testimony revealed that Dominick was part owner of a local hair salon. Depositions of a number of people who did business with Dominick indicated that their opinion of him did not change as a result of the publication of the letter. Finally, Dominick did not demonstrate any damage to his business or reputation.

The Index Journal moved for summary judgment on the libel, invasion of privacy and intentional infliction of emotional distress claims. In addition, it moved to dismiss the negligence claims. Judge Watson granted the motion in its entirety, finding as a matter of law that the libel claim failed because there was nothing defamatory in the letter. The only inference that one could draw from the letter is that Dominick is gay. Since Dominick is, in fact, gay, there is no legal basis for asserting a libel claim. With respect to the invasion of privacy claim, the court held that there was no showing that the *Index Journal* intentionally disclosed private facts about Dominick on a matter that was without public interest. Here, it was undisputed that Collins believed that Dominick was the author of the letter prior to publication. No intentional conduct adverse to Dominick was presented to the court. In addition, because the letter discussed two major public events, one of which had previously received coverage in the paper, the letter was of legitimate public interest.

Moreover, the court noted that publication of the letter was the result of the criminal act of an unknown third party and not an intentional act of The Index Journal. The newspaper was merely the vehicle for the criminal act. Likewise, the lack of an intentional act resulted in the dismissal of the intentional infliction of emotional distress claims.

Finally, the court dismissed Dominick's negligence claim, finding that South Carolina law did not allow one to masquerade a defamation claim as negligence where the elements of defamation could not be established. Based on the foregoing, the court granted the Index Journal's motion for summary judgment as to the libel, invasion of privacy and intentional infliction of emotional distress claims and the motion to dismiss with respect to the negligence claims. *Todd V. Lamb*

Civil Litigation Notes

Kansas — Sanford P. Krigel, attorney for J.Noel Gardiner, announced April 24 that he will petition the U.S. Supreme Court to review the decision in *Estate of Gardiner*, 42 P.3d 120 (Kansas Supreme Ct., March 15, 2002), in which the court held that a male-to-female transsexual should be considered male for purposes of Kansas marriage law, thus rejecting J.Noel Gardiner's intestate succession claim against the estate of Marshall Gardiner, her late husband. *Gay.com/PlanetOut.com*, April 26. Since the Supreme Court previously denied certiorari in a case presenting similar legal issues from Texas, and there is no split of authority among the highest courts of the states or the circuits, it seems unlikely that the Supreme Court would grant certiorari in this case, but it doesn't hurt to try.

Virginia — In a pending same-sex harassment case, U.S. District Court Judge Jones (W.D. Va.) ruled on April 12 that the defendant's allegation that the female supervisor who was alleged to be a harasser was an "equal opportunity harasser" (i.e., went after both men and women) created an issue of fact unsuitable for resolution on summary judgment, and refused to grant judgment in the case. Although there was some evidence that the supervisor, a woman, had harassed men as well as women, the evidence was equivocal and the court believed that factual determinations that necessitate trial were present in this case. The court also refused to dispose of a retaliation claim.

Michigan — When suing for employment discrimination under a municipal civil rights ordinance, it is a good thing to know who your employer is! Darnell C. Pettway, a court reporter employed in the 36th District Court of Michigan, filed suit alleging sexual orientation discrimination in violation of a Detroit city ordinance against the 36th District Court and various administrators of that court, the Detroit Judicial Council, and the City of Detroit. The Judicial Council and the City moved to have the case against them dismissed on grounds that they are not Pettway's employer. In an unpublished opinion issued April 19, *Pettway v. Detroit Judicial Council*, 2002 WL 652125, the Michigan Court of Appeals affirmed the trial court's order granting summary disposition to the Judicial Council and the City on that ground. Wrote the court per curiam: "We are convinced that not factual development could justify plaintiff's recovery against the Detroit Judicial Council or the City of Detroit. We find it clear that the district court, not the Detroit Judicial Council or the City of Detroit, had responsibility for all court operations, including personnel matters relating to court employees... Because the Detroit Human Rights Ordinance applies only to discriminatory conduct by employers, we conclude that the trial court

properly granted the Detroit Judicial Council and City of Detroit summary disposition..." The appeals court also agreed with the trial court's conclusion that Pettway's tort claims should be dismissed on grounds of governmental immunity.

Missouri — A federal jury awarded \$1.2 million in damages to a former Sprint Communications Co. employee who claimed he had been sexually harassed and retaliated against by his male supervisor. *Thorne v. Sprint Communications Co.*, No. 00-00913-HFS (W.D.Mo., March 29, 2002). The evidence presented by Michael Thorne included verbal solicitation and unwanted touching. After Thorne communicated these things to the Human Relations department, he was denied a bonus and the supervisor then allegedly created a paper trail to document poor work performance (even though Thorne had received excellent work evaluations during his 14 years with the company). The jury held for the company on the same-sex harassment charge, but found for Thorne on the retaliation charge, for which the damages were awarded. BNA Daily Labor Report No. 65, April 4, 2002, at A-3/4.

California — Reviving a same-sex harassment claim, the California First District Court of Appeal ruled in *Harris v. Department of Corrections*, 2002 WL 462722 (March 27, 2002) (not officially published), that a male prison guard had pled sufficient facts to withstand a motion for summary judgment. Jeffrey Harris claimed that his supervisor, Al Lankes, subjected him to unwanted touching of a sexual nature numerous times over a period of six weeks, and that management had failed to act on Harris's complaints about this conduct. Harris also alleged retaliation, but the court of appeal found insufficient facts pled to support a retaliation claim, since the adverse occurrences mentioned by Harris were not tied in any way to his complaints. The court applied the standards developed in federal sexual harassment litigation, and found that they could be applied in a California Fair Employment and Housing Code context.

New York — Lambda Legal Defense Fund is representing two men who lost same-sex partners under circumstances in which the Workers Compensation Law would provide survivors benefits if they had been married. Larry Courtney lost his partner of 13 years, an employee of a company at the World Trade Center, in the terrorist attack last Sept. 11, and Bill Valentine lost his partner, an airline flight attendant, in the crash of American Flight 587 in Queens last November. Both men were denied benefits by the insurance companies underwriting their late partners' employers' Workers Compensation obligations. Lambda represents them as they appeal these rulings within the Workers Compensation system. *New York Times*, April 23. Adam Aronson, a Lambda attorney in-

volved in the case, told the *Times* that there are at least 21 other gay or lesbian people who lost partners in the World Trade Center attack, but it was now known whether any of them had tried to obtain Workers Compensation benefits.

New York — U.S. District Judge Constance Baker Motley granted summary judgment to the defendants on a same-sex harassment claim, finding that the record was completely devoid of evidence that the female plaintiff's female supervisor had made unwanted sexual advances. *West v. Mt. Sinai Medical Center*, 2002 WL 530984 (S.D.N.Y., April 9, 2002). The plaintiff claimed she suffered a hostile environment because her supervisor offered to buy her yogurt, occasionally asked about her weekend plans, and sat close to her when others were not around, but Judge Motley found there were no sexual innuendos in any of the supervisor's actions. Furthermore, there was no evidence that the supervisor was a lesbian, or had any particular sexual interest in the plaintiff.

Texas — The National Prison Project of the ACLU filed suit in U.S. District Court in Wichita Falls on behalf of Roderick Keith Johnson, a gay African-American state prisoner, alleging that he was unconstitutionally subjected to sexual slavery by fellow prisoners with the knowing acquiescence of officials at a North Texas prison. According to Johnson, he was raped several times by fellow prisoners, complained to prison authorities, but was provided no protection, and no sanctions were imposed on the guilty parties. Margaret Winter, associate director of the Prison Project, stated: "Our lawsuit shows that Texas prison officials think black men can't be victims and believe gay men always want sex so they threw our client to the wolves." Johnson has been transferred to another prison. The suit seeks compensatory and punitive damages, an injunction to keep Johnson out of the general prison population, clearing of his disciplinary record, and medical and psychiatric treatment for him. *Ft. Worth Star-Telegram*, April 19. A.S.L.

Criminal Litigation Notes

California — On May 1, the California Supreme Court announced that it would review the *Rosenkrantz* parole case, thus putting off the imminent release of Robert Rosenkrantz from prison pursuant to a court of appeal directive issued in January. *In re Robert Rosenkrantz*, 116 Cal. Rptr. 2d 69 (Cal. Ct. App., 2nd Dist., Jan. 18, 2002). On June 21 of last year, a Superior Court judge had ruled that Gov. Davis had abused his discretion in refusing to allow parole for Rosenkrantz, who is serving a lengthy sentence for a murder he committed when he was a semi-closeted teenager, just graduated from high school, and a taunting friend of his brother outed him to his family, triggering severe emotional distress. This decision was upheld on ap-

peal. Rosenkrantz, who has been in jail for more than 15 years, has been a model prisoner who continued his education and now has the support and understanding of his family. (His father had thrown him out of the house on learning he was gay.) As of this July, Rosenkrantz will have been in custody for 17 years, the minimum specified term of his 17 years to life prison sentence. In earlier stages of his appeals for parole, Rosenkrantz has relied on campaign statements in which Gov. Davis intimated that he would automatically reject any application for parole from a convicted murderer, to claim that his application was not afforded appropriate due process, and he has prevailed on that argument in the lower courts, but the grant of review "supercedes" the court of appeal decision so holding. *Los Angeles Times*, May 2.

Massachusetts — On April 3, the Massachusetts Appeals Court rejected several claims of error in *Commonwealth v. Collins*, 54 Mass. App. Ct. 1109, 2002 WL 500058 (unpublished disposition), in which a man was convicted of indecent assault and battery for kissing a 13-year-old boy on the lips in a vacant bathroom. The court rejected the defendant's argument that a kiss cannot be an indecent assault because it did not involve unwanted touching of "private parts" (i.e., genitals). "Kissing on the lips can be construed as a sexual gesture," wrote the court in its unsigned memorandum opinion, noting that whenever statutes or prior decisions listed body parts relevant for such charges, the lists were never written as all-inclusive. The court also rejected the defendant's argument that the trial court had improperly excluded evidence that the victim was gay. "Evidence of the victim's sexual orientation was not relevant where consent was not in issue," said the court. Evidently, the defendant's theory of the case was that the victim had written to him, telling him that he was gay and that his father had reacted violently to that news and asking to see the defendant. The court found all this irrelevant to whether the defendant was guilty of violating the pertinent statute, which does not provide a consent defense.

Tennessee — Richard Caldwell was convicted of first degree murder and sentenced to death for killing Tony Climer by shooting him twice in the back of the head with a shotgun. Caldwell confessed to shooting Climer, but claimed he had been provoked by Climer making a sexual pass at Caldwell and his son and splashing whiskey in his face. He was prosecuted on alternative theories of first or second degree murder, voluntary manslaughter and involuntary manslaughter. While charging the jury on the second degree murder charge, the trial judge stated that "when the defendant is shown to have used a deadly weapon, and death is clearly shown to have resulted from its use, it is a presumption of law that the killing was done maliciously, that is, with the malice necessary

to support a conviction of murder in the second degree." In appealing his death sentence, Caldwell argued that this erroneous charge may have led jurors to reject the manslaughter charges outright, having concluded that malice should be presumed due to Caldwell's use of a shotgun; furthermore, that the jurors may have incorrectly concluded that because he used a gun, sufficient malice should be presumed to establish the offense of first degree murder, thus subject him to the death penalty. His arguments were rejected on appeal by the state courts, as well as by the federal district court on his habeas corpus petition, but a 6th Circuit panel, voting 2-1, bought the argument and ordered the district court to issue the writ, which will require the state to retry him or release him. "We believe the instruction did particular damage by undermining Caldwell's alternative theory of the killing based on a claim of 'provocation,'" wrote Judge Merritt for the majority of the panel. "At trial, Caldwell's confession was admitted into evidence and his counsel conceded that Caldwell shot Climer. Caldwell contended, however, that he shot Climer in a rage after being provoked by homosexual advances and by having whiskey 'slapped' in his one good eye. Caldwell's trial strategy was to convince the jury that Climer had so provoked him that the killing was not 'malicious' in the eyes of the law. Manslaughter and malice are incompatible because at the time of the trial, Tennessee law defined manslaughter as the 'unlawful killing of another without malice, either express or implied.'... The unconstitutional jury instructions in effect trumped Caldwell's defense of provocation." Dissenting Judge Norris argued that the jury instruction clearly applied its reasoning only to the 2nd degree murder charge, and thus had not prejudiced Caldwell with respect to his alternative manslaughter theory. *Caldwell v. Bell*, 2002 WL 753804 (April 30, 2002).

California — Rev. Paul Shanley, a Roman Catholic priest, was arrested at a friend's home in San Diego and charged with three counts of rape of a child, according to an Associated Press report on May 2. Shanley will be extradited to Massachusetts to face trial on the charges. Shanley is at the heart of the unfolding scandal within the Catholic Church over pedophilia in the priesthood. Gregory Ford, 24, and his parents are suing the Archdiocese of Boston and Cardinal Bernard Law for negligence, alleging that Law assigned Shanley to the St. Jean Parish in Newton, where he allegedly raped Ford, then a minor, three times between 1983 and 1990. It is alleged that Law made the transfer after complaints about Shanley's pedophilia, including active involvement with NAMBLA, made him unacceptable in his existing assignment. The arrest in this case, instigated by Middlesex District Attorney Martha Coakley, was based on other complaints of mo-

lestation by Shanley. Recent newspaper reports have suggested that Shanley blackmailed the Archdiocese by threatening to reveal embarrassing sexual information about other priests if he was not quietly given a new assignment. The scandal has sparked an international debate; as a result of homophobic remarks by some church spokesmen, part of the debate concerns the issue of whether gay men should be allowed to serve as priests. *New York Times*, May 3.

Texas — On April 3 a Texas jury convicted Jon Paul Marsh, 17, of murder and sentenced him to 70 years in prison for killing Nathan Mayoral, 14, his former lover, on March 20, 2001. According to newspaper reports on the case, Marsh had pled not guilty by reason of temporary insanity due to involuntary intoxication. Marsh claimed that he was under the influence of powerful anti-depressants at the time of the killing, which he was taking for psychological problems arising from his family's rejection after he "came out" to them six months prior to the murder. Marsh's defense attorney argued that his parents told him that homosexuality was an "abomination." (This contradicted statements by Marsh's parents, who said they extended "unconditional love" to their son when he came out to them.) This was a violent murder: the evidence showed that Marsh choked Mayoral, hit his head with a hammer, wrapped his head in plastic and dumped his body along a deserted dirt road. Marsh will not be eligible for parole until he has served at least 30 years. His attorney plans to appeal the verdict. *Houston Chronicle*, April 4. A.S.L.

Legislative Notes

ENDA - Federal - The U.S. Senate's Committee on Health, Education, Labor and Pensions, chaired by Sen. Edward M. Kennedy (D-Mass.) approved by voice vote the current version of the Employment Non-Discrimination Act, S. 1284, which would ban intentional discrimination on the basis of sexual orientation by employers, employment agencies and unions (including public employers), but would not affect the ban on military service. Also, ENDA would not provide a cause of action for "disparate impact" cases, or require recognition of same-sex partners by employers. The majority leader's office indicated that the measure will be called up for a vote on the floor of the Senate later this year. There are 44 co-sponsors in the Senate, the largest number in the history of this proposed legislation, including three Republicans and one independent. The only previous time it came up for a vote, during the 1996 national elections, it fell short of passage by one vote. (That is, it fell one vote short of a tie on the floor, which would have been broken in favor of passage by Vice President Al Gore.) Six senators who voted for it in 1996 have not become co-sponsors, but are

expected to vote for it again. Also pending in the Senate is a hate crimes bill that would provide severe penalties under federal law for violent crimes in which the victim was selected because of her sexual orientation. *New York Times*, April 25; BNA Daily Labor Report No. 80, 4/25/02, at AA-1.

Alaska Executive Order — Alaska Governor Tony Knowles (D.) signed Executive Order No. 195 on March 5, 2002, which "prohibits and prevents" state employees from engaging in discriminatory conduct based on race, sex, color, religion, physical or mental disability, sexual orientation, or economic status. The last two categories are not covered by state civil rights statutes. The order was issued in response to a report by the Governor's Commission on Tolerance, which made 100 recommendations to reduce discrimination and intolerance in Alaska. The order mandates establishing a system to receive, investigate and resolve complaints of discrimination against state employees. BNA Daily Labor Report No. 68, 4/9/2002, p. A-13.

California Executive Order — On April 4, California Governor Gray Davis issued an executive order intended to assist Keith Bradkowski, the registered domestic partner of Jeff Collman, a flight attendant for American Airlines who died in the Sept. 11 attacks, to obtain compensation under the federal Sept. 11 Victim Compensation Fund regulations. The regulations issued by fund administrator Kenneth Feinberg provide that eligibility will depend on how state law deals with unmarried partners. Under the California Domestic Partnership Law, registered partners are entitled to intestate succession, but Collman's parents have been contending that they, not Bradkowski, are entitled to the payment from the Compensation Fund. *Washington Blade*, April 12. In the same issue, the *Blade* reported that American Airlines paid Collman's parents the \$25,000 that it pays to the "next-of-kin" of employees, but that Bradkowski has received \$500,000 under a life insurance policy purchased by Collman that listed Bradkowski as beneficiary.

Colorado — The Colorado state Senate tentatively approved a bill that would prohibit sexual orientation discrimination in employment in a floor vote on April 17. The bill was expected to encounter strong opposition in the Republican-controlled House. *Denver Post*, April 18.

Puerto Rico — Hate Crimes — On March 6, Puerto Rico Governor Sila M. Calderon signed into law a penalty-enhancement hate crime law that includes sexual orientation. *Washington Blade*, April 12.

San Jose, California, and Montgomery County, Maryland — Here's an amazing coincidence: on the exact same date, April 2, the San Jose City Council and the Montgomery County Council, on opposite coasts, voted that

same-sex couples should be treated the same as married couples in terms of real estate transfer taxes. In Montgomery, the change was spurred by a local realtor's association, who saw it as an issue of fair housing law and considered the requirement of transfer taxes when a gay person wants to add a same-sex partner as co-owner on a deed or in other transfer of title situations to be discriminatory. In San Jose, the change was spurred by the city's only openly gay council member, responding to a constituent complaint of having to pay the tax. The Montgomery County voted was on a proposed amendment; the San Jose vote was to approve the concept in principle and commit the Council to enacting appropriate legislation. In reporting on the San Jose vote, the *San Jose Mercury News* (April 3) stated that San Francisco, Oakland and Berkeley have already adopted similar policies. Reporting on the Montgomery County vote, the *Washington Post* (April 3) quoted a spokesperson from Human Rights Campaign to the effect that other jurisdictions with such policies include Philadelphia, Sacramento, and Oakland. Which list is correct?

Allentown, Pennsylvania — The Allentown City Council voted on April 3 to add "sexual orientation" and "gender identity" to the city's human relations ordinance, forbidding discrimination. The vote was 5–2, and Mayor Roy Afflerbach, who had to be out of town that night, had pledged in advance to sign the measure, which he endorsed. There was some last-minute by-play as an attempt was made to remove "gender identity" from the measure, on the theory that it would be subsumed under existing protection against sex discrimination, but ultimately the debate showed that discrimination on the basis of gender identity is distinct. According to a news report in the *Allentown Morning Call* on April 4, this city becomes the 230th in the nation to ban sexual orientation discrimination, and the first in Pennsylvania to ban discrimination on the basis of gender identity.

Maine — Portland City Councilor Philip Dawson is seeking an amendment to the recently-enacted ordinance requiring that all Portland contractors provide domestic partnership benefits to employees. Dawson wants an exemption made for the Salvation Army, which has stated it will cease taking city money rather than provide the benefits. Dawson stated that his intent was to make sure that vital services to Portland's senior citizens are continued, since the Salvation Army provides the city's only senior activity center and a meals-on-wheels program for seniors, largely with city money. *Portland Press Herald*, May 2.

New York City — The New York City Council voted overwhelmingly on April 24 in favor of an amendment to the city's human rights ordinance (45–5 with some abstentions) that provides a broad definition of "gender," one of the

characteristic in the list of forbidden grounds for discrimination. According to the new definition, gender is "a person's gender identity, self image, appearance, behavior, or expression, whether or not that gender identity, self image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth." The measure is intended to clarify and codify some court authority holding that transgendered persons are protected under the ordinance. Former Mayor Giuliani had opposed the measure on the ground that it was unnecessary in light of the case law. Although Mayor Mike Bloomberg had expressed agreement with Giuliani's position, he promptly announced that he would sign the measure, which he did on April 30. *New York Times*, April 25 & May 1; BNA Daily Labor Report No. 84, 5/1/02, p. A–13.

Tacoma, Washington — The Tacoma City Council voted 8–1 on April 23 to amend the city's anti-discrimination law to add "sexual orientation" and "gender identity" to the list of forbidden bases for discrimination in employment and housing. A repeal referendum is expected, not least because the Council had passed a sexual orientation discrimination law in 1989 that was repealed in a referendum. *Tacoma News Tribune*, April 24.

Savannah, Georgia — The *Augusta Chronicle* reported on April 3 that Savannah, Georgia, was amending its non-discrimination policy for city employment to add "sexual orientation" to the list of prohibited grounds for discrimination. Other Georgia municipalities that have adopted such non-discrimination policies were reported to include Atlanta, Decatur, Lithia Springs, DeKalb, Fulton, and Tybee Island.

St. Louis County, Missouri — The Parkway School Board voted 4–3 against a proposal to add "sexual orientation" to the school district's policy on nondiscrimination and harassment. According to an April 15 report in the *St. Louis Post-Dispatch*, the president of the board, who voted against the proposal, stated that sexual orientation was "not protected" by federal or state law or law in west St. Louis County. "I don't want them to have more protection than other people," she said, in the non sequitur of the year. The school board's existing policy covers race, color, creed, national origin, sex, marital status, age, and physical or mental handicap. Adding sexual orientation to the list would provide gays with more protection than whom?

Nebraska — A bill to ban employment discrimination on the basis of sexual orientation was filibustered to death in the Nebraska legislature during April. Sen. Mike Foley of Lincoln successfully prevented the Senate from taking up the matter by filing 22 amendments, each of which would be entitled to be debated, and leaving inadequate time for three rounds of debate on the main bill prior to the planned adjournment. Following a new trend of exempting

small businesses from gay rights bills, the proposal, Legislative Bill 19 introduced by Sen. Ernie Chambers of Omaha, would apply only to employers with 15 or more employees, and would expressly exempt churches and their affiliates. *Omaha World-Herald*, April 17. A.S.L.

Law & Society Notes

A little-noted last-minute policy directive of the Clinton Administration extending some recognition to domestic partners of American foreign service personnel has been continued in place by the Bush Administration, according to an April 12 article in the *Washington Blade*. After hearing from organizations representing lesbian and gay foreign service workers about the difficulties encountered by themselves and their partners in foreign postings, Secretary of State Madeleine Albright sent a directive on Dec. 26, 2000, to the heads of American embassies and diplomatic posts throughout the world instructing them, to the extent possible consistent with existing statutes and regulations governing federal personnel policies, to "ensure" that "State Department practices are fairly and equitably applied in a consistent manner to all members of the households of State Department employees assigned to our overseas missions abroad." The directive defines such households to "include not only spouses and dependent children, but also unmarried partners, aging parents, [and] other relatives or adult children, who fall outside the department's current legal and statutory definition of family member." According to foreign service workers, this directive has been most useful in securing necessary visas to allow U.S. foreign service workers to establish residence abroad with their same and opposite sex partners. It has also led to inclusion of partners in the social life of the U.S. diplomatic community. According to the *Blade* report, Sec. Colin Powell's staff reviewed all such directives upon taking office and decided to leave this one in place. It has already proved useful to openly-gay U.S. Ambassador to Romania Michael Guest, whose partner lives with him in the U.S. embassy in Bucharest and participates in diplomatic functions together with the spouses and partners of other foreign service workers.

In a ranking of national lesbian and gay organizations based on the size of their annual budgets, the Lambda Legal Defense & Education Fund ranked second (\$6.3 million), behind Human Rights Campaign (\$18.6 million). The National Lesbian and Gay Law Association ranked 20th, with an annual budget of \$25,000. Other legal groups in the rankings were Servicemembers Legal Defense Network (ranked ninth with a budget of \$1.8 million), and the National Center for Lesbian Rights (twelfth, \$1.2 million). Other gay legal organizations, considered regional, were not included in the

national rankings, although some of them have budgets that would undoubtedly place them higher on the list than NLGLA. *Washington Blade*, April 12.

Releasing the annual compilation of statistics on anti-gay incidents, which is coordinated by the Gay and Lesbian Anti-Violence Project in New York City, gay advocacy groups indicated that the number of reported hate crimes had actually declined by about ten percent from the prior year. The data is compiled from anti-violence organizations in 12 states. *Detroit Free Press*, April 18.

An internal church of the United Methodist Church has determined that the decision whether to suspend an openly-gay pastor is within the discretion of the pastor's Bishop, and that church doctrine does not require automatic suspension. The April 25 ruling came in the case of Rev. Mark Edward Williams, who came out last June at the Methodists' Pacific Northwest Annual Conference. He is currently serving as pastor of the Woodland Park United Methodist Church in the Seattle diocese, and the parishioners of the church have indicated that they want Williams to continue in that role. Bishop Elias Galvan of Seattle announced that he would not suspend Williams, noting that under church guidelines, pastors should be suspended when their conduct affects the life of the congregation, the pastor's own life, or the lives of those around them, and concluding, "I don't see at the present time that any of those situations have happened." *Belleville News-Democrat*, April 26.

The U.N. Economic and Social Council will continue to reject the International Lesbian and Gay Association's application for consultant nongovernmental status, as a result of a 29-17 vote taken on April 30. According to a May 1 report in the *Washington Times*, Muslim and Catholic states continued to oppose ILGA, purportedly due to suspicions that some pedophile groups may still be members. ILGA once had the consultative status, but it was withdrawn after reports that the North American Man/Boy Love Association (NAMBLA) was an organizational member of ILGA. In addition, the *Times* reported that U.S. diplomats had blocked an effort to use an inclusive definition of "family" in a major document being prepared for the U.N. Child Summit at the General Assembly that would have included unmarried cohabiting couples and same-sex partners. Instead, the wording will be simply "the family, in its various forms."

USA Today reported that a poll of U.S. college freshmen with 281,064 respondents showed that freshman are more "liberal" in their political views than at any time since 1975. The poll showed 58% support for same-sex marriage, the highest number ever reported.

R.J. Reynolds Tobacco Company has begun offering employee benefits for domestic part-

ners of employees, both same-sex and opposite-sex. Reporting on this, the *Winston-Salem Journal* observed on March 31 that several large employers in North Carolina had begun to give such benefits without any public fanfare, and commented: "In our public life here gay rights is still a dividing line. But in the corporate world gay rights has become a simple matter of crunching numbers and keeping up with the rest of the Fortune 500. Providing benefits for a gay partner goes a lot further toward accepting homosexuality than adding sexual orientation to a school system's anti-discrimination policy. But the corporate world isn't hung up on defining sin."

A professor at the University of Missouri-Kansas City, who had the temerity to publish scholarly papers arguing that not all intergenerational sex is necessarily harmful to teenage participants has become the center of a storm of adverse comment, including action by the Missouri legislature to reduce the university's appropriation by the amount of the professor's salary and benefits. Prof. Harris Mirkin published an article in the *Journal of Homosexuality* in 1999, arguing that not all such sex should be lumped into the same category. "According to the dominant formulas the youths are always seduced," he wrote. "They are never considered partners or initiators or willing participants even if they are hustlers... In sexual politics definitions are characteristically vague, so that statistics from the mildest activities can be blended with images from the most atrocious... Though Americans consider intergenerational sex to be evil, it has been permissible or obligatory in many cultures and periods of history." Mirkin argues that those making policy on this issue should be distinguishing between sex involving teenagers and sex involving prepubescent children, as well as distinguishing between forced sex and consensual sex. *Kansas City Star*, April 1.

After much debate and local controversy, the Broward School Board (Miami, Florida) voted 6-3 on April 23 to approve a proposal to work with the Gay, Lesbian and Straight Education Network (GLSEN) to design a diversity education program for use in the schools that will promote tolerance and understanding about homosexuality. A prior version of the proposal had been voted down by the Board, because some members expressed concerns that students would be exposed to sexually explicit materials. Under the new proposal, GLSEN will participate in developing the program, but will not present material directly to students, although gay and lesbian students might participate in presentations to teachers and administrators. *Miami Herald*, April 24.

Lambda Legal is representing Equality Mississippi, a statewide gay rights group, in filing a complaint against Mississippi Justice Court Judge Connie Glenn Wilkerson, who published

a letter to the editor in a local newspaper in which he stated: "In my opinion, gays and lesbians should be put in some type of mental institution instead of having a law like this passed for them," referring to an AP story previously published in the newspaper about attempts by surviving gay partners to bring wrongful death actions. Mississippi's Code of Judicial Conduct specifically calls on judges to avoid "expressions of bias and prejudice" and includes "sexual orientation" among prohibited grounds.

We note the death of retired Supreme Court Justice Byron R. White, author of the notorious opinion for the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), upholding Georgia's felony sodomy law. White particularly irked gay critics by characterizing as "facetious" the argument that the right to engage in gay sex should enjoy the same constitutional protection as other sexual activities covered by the constitutional right of privacy that the Court had previously recognized. His opinion in *Hardwick* appeared inconsistent with the Court's prior privacy decisions, but was fully consistent with his own prior votes in privacy cases, as White was a dissenter in *Roe v. Wade* and the subsequent decisions using the privacy right to strike down state restrictions on access to abortions. On his retirement in 1993, President Clinton appointed Ruth Bader Ginsburg to the Court. Ironically, Ginsburg is one of the most consistent supporters of gay rights on the federal bench. A.S.L.

Australia High Court Rejects Attempt to Ban Lesbians from Access to Fertility Treatment

The High Court of Australia (Australia's Supreme Court) has unanimously rejected a challenge to an decision upholding access to infertility treatment for single heterosexual women and lesbians: *Re McBain; Ex parte Australian Catholic Bishops Conference*, [2002] HCA 16.

In *McBain v State of Victoria*, (2000) 99 FCR 116, a single judge of the Federal Court of Australia granted a doctor wishing to give invitro-fertilisation treatment to a heterosexual single woman a declaration that the provisions of the Victorian Infertility Treatment Act preventing IVF therapy for other than married women or women living with a man in a de facto relationship were invalid. The ground of invalidity was inconsistency under the federal Constitution with the federal Sex Discrimination Act. The federal Act prevents discrimination in the provision of services on the ground of sex and marital status.

Because the State of Victoria took a "neutral" position in the litigation, the Roman Catholic Church was granted leave to appear as amicus curiae - a procedure in Australia which is rare by contrast with the United States. The federal Attorney-General declined to intervene. After the declaration was made, however,

the State of Victoria declined to appeal. It was politically expedient to have the discriminatory parts of what was a previous government's legislation declared invalid.

In an attempt to challenge the decision, the Catholic Bishops obtained the (conservative) federal Attorney-General's "fiat" - an ancient prerogative whereby the relator (in this case, the Bishops) stand in the place of the Attorney-General who has a right to "enforce the law." In addition, the Attorney-General intervened to support the Bishops.

The grounds on which the High Court rejected the claim came down to a basic point: lack of standing. No party to the Federal Court decision had appealed it. Despite their opportunities in the Federal Court, the Catholic Church had not been joined as a party to those proceedings and nor had the Attorney-General. Two justices said "the Attorney-General cannot have a roving commission to initiate litigation to disrupt settled outcomes in earlier cases, so as to rid the law reports of what are considered unsatisfactory decisions respecting constitutional law."

The case has been played by the conservative (Liberal Party) Prime Minister, John Howard, as a political issue. He claims all children need to have a father as well as a mother. The impact of the case on lesbian parenting has been given prominence in the media, with the difference between having a father and a mother and having loving parents being discussed. Although Howard is promising to introduce legislation to amend the Sex Discrimination Act to permit States and Territories to deny single women and lesbians access to IVF treatment, the opposition of the Labor Party and Australian Democrats should prevent the amendments passing the Senate. There is no indication that access to IVF treatment will be restricted in States and Territories where it is currently available to single women and lesbians. *David Buchanan SC*

Other International Notes

Australia - In an opinion running more than 140 pages, Justice Guest of the Family Court of Australia ordered an increase in visitation for a sperm donor father over the protests of a child's mother and co-parent, according to a press release by the Court. *Re: Patrick: An Application Concerning Contract*, No. ML 10036 of 1999 (April 5, 2002). Said Justice Guest in a prologue to the opinion, "The proceedings before me involve a sperm donor who is a homosexual, a committed lesbian couple and a two-year old boy. They have brought into stark relief the complexities surrounding donor insemination and its relationship with family law." The judge pointed out that the failure of Australian society to accord full recognition to same-sex relationships and to modify legal institutions to accom-

modate the needs of alternative families was a stumbling block in the case. In this case, with a known sperm donor, the child was allowed to develop a relationship with his biological father as a result of a consent order entered upon a petition by the father. The judge found that the family in this case constitutes the co-parent mothers and the child, but that in the best interest of the child, continued and expanded contact with the father is warranted: "The issue concerning contact between the father and Patrick, which I have addressed in this judgment, is not dissimilar from that arising in traditional heterosexual family disputes and decided daily by the Court. It is not unique. It is those issues that bear prominence including the concept of 'family', and the father's role within that family as a donor of genetic material. I do not see him being a member of the family construct. It is his relationship with Patrick that is the central focus of his role and which should be permitted to grow parallel with the happiness and well being of the 'family.' When there are tensions between these two positions, I take into account all those relevant considerations to which I have referred, and in the exercise of my discretion, as I am required to do, to make my determination in Patrick's best interests." Noting that Australian law has extended limited recognition to lesbian and gay families, Judge Guest opined that the legislature should focus more directly on family law issues: "Having regard to the issues addressed in this judgment, it is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of 'family', and the role of the law in regulating arrangements within the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick's biological and social reality remains unrecognised. While the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick, and the family units to which they belong, this is not a basis for inaction."

Australia — Queer Planet distributed a report on April 12 that the Victoria Supreme Court imposed a suspended sentence on Raymond Hood for assisting his former lover, Daryl Colley, a 31-year-old HIV+ man, to commit suicide. According to the report, Colley decided he wanted to die after learning he had a brain tumor, and was apparently influenced by having seen the movie "It's My Party." A pre-death wake with 70 guests was held the night before his death, then Hood held Colley's nose and covered his mouth after Colley swallowed a lethal cocktail of drugs and alcohol. Justice John Coldrey said Hood should not have encouraged this and should have sought professional counseling for Colley, but imposed a sus-

pended sentence of 18 months, allowing Hood to walk free from the court.

Austria — Dr. Helmut Graupner, a leader of the effort for repeal of Art. 209, under which gay men have been sentenced to jail time for having sex with teenage boys, reports that the Vienna Appeals Court actually increased from six to nine months the sentence for a 36-year-old man who was convicted of having sex with a 17 year old boy. At the time, apparently, the man had been probation after prior convictions for sex with 16 and 17 year old boys. When defense counsel raised constitutional objections to the law, noting that the boys were above the age of consent for heterosexual sex, the president of the court reportedly stated: "Austrians want it that way, and you have to accept this."

Scotland — For the first time, a Scottish court has ruled that lesbian co-parents should have full parental rights concerning their partners' children. The *Daily Telegraph* reported April 8 that the previous week Sheriff Noel McPartlin issued an order to that effect. As a result, one of the children in the case now has three legal parents, a father and two lesbian moms. The decision conflicts with one issued in Glasgow on March 7 by Sheriff Laura Duncan, who ruled that lesbian partners do not constitute a family unit and thus the sperm donor to one of them is entitled to parental rights towards their child. That case is on appeal, and the appellants now have some ammunition in the form of McPartlin's ruling. The parties in all these cases are officially anonymous, mainly to protect the interests of the children.

Canada — The Quebec Human Rights Commission has ordered damages of \$36,000 (Canadian dollars) to be paid to Roger Thibault and Theo Wouters, a gay couple residing in Pointe Claire, by their immediately adjacent neighbors, who were found to have engaged in unlawful harassment of the gay couple. *Globe and Mail*, April 4. The commission found infringements of the couple's right to privacy, dignity and reputation, and personal security and integrity.

Canada — The *Globe and Mail* (April 10) reported that the British Columbia Human Rights Tribunal has held the North Vancouver school board responsible for the homophobic bullying of a high school student, Azmi Jubran. Jubran does not identify himself as gay. He told the tribunal he was physically assaulted, spat upon, kicked and punched by other students while attending Handworth Secondary School, and was called "homo" and "faggot." He said other students also threw baseballs at his head and set his shirt on fire, all because they believed him to be gay. The tribunal awarded Jubran \$4,000 in damages. The opinion is available online at www.bchrt.gov.bc.ca.

United Kingdom — Carl Howard and Stephen Brayshaw exchanged vows and had their partnership officially recognized in front of a

registrar at the Manchester Register Office on April 20, the first same-sex couple in Britain to take advantage of Manchester's new partnership law. While same-sex couples can register in London, so far only Manchester also affords a formal ceremony with a registrar to solemnize the union. *Daily Mail*, April 22. ••• The Wimborne Magistrate's Court found Harry Hammond, a street preacher, guilty of harassment on April 24 for standing on the sidewalk in Bournemouth town center, brandishing a placard stating "Stop Immorality, Stop Homosexuality, Stop Lesbianism," and loudly quoting from the Bible. A passerby called the police and complained that Hammond was inciting people to attack gays. When Hammond attempted to lecture the court from the Bible, he was told he was "in the witness box, not a pulpit," and he was fined 300 pounds and assessed 395 pounds for court costs in his case. The magistrate also ordered that his placard be destroyed.

Egypt — On April 13 an appellate court reversed the convictions of five Egyptian men who had been convicted of immorality for engaging in homosexual acts, according to a report in the *Washington Blade* on April 19. The International Gay & Lesbian Human Rights Commission expressed hopefulness that this signals an end to the unusual crackdown against gays by the Egyptian government over the past few years. Homosexual activity, as such, is not criminalized in Egypt, but the government has resorted to other laws to harass and prosecute gay people recently. A.S.L.

Professional Notes

Henry H. Perritt, Jr., Dean of the Chicago-Kent College of Law and a declared candidate for the House of Representatives from the 10th Congressional District of Illinois, issued a statement to the press on April 18 that he is gay and lives with his partner of 17 years in Glencoe, Illinois. Perritt has sought endorsements and financial support from the Lesbian and Gay Victory Fund and Human Rights Campaign, but was turned down, according to a story in the *Chicago Tribune* on April 19. The Victory Fund only supports openly-gay candidates (which Perritt really wasn't when he applied), and generally does not endorse first-time candidates. For Human Rights Campaign, the issue was that the Republican incumbent, Mark Kirk, has a record on gay issues that HRC's political director characterizes as "very good." HRC has a history of backing pro-gay heterosexual incumbents, even when there is a gay candidate in the race. Dean Perritt took a leave of absence from the law school to pursue his campaign for Congress.

LeGaL member Cynthia Schneider is a recipient of the 13th Annual Legal Services Awards presented by the Association of the Bar of the City of New York. She is director of the HIV Project at South Brooklyn Legal Services, and has been involved actively in City Bar committee work as well as LeGaL activities. The award was to be presented May 7 at a reception at the City Bar. (*NYLJ*, 4/26/02)

We would be remiss if we did not note here the imminent retirement of one of the most

gay-supportive high court judges in the world, the Honorable Claire L'Heureux-Dube of the Supreme Court of Canada, who has announced that she will retire as of July 1. Justice L'Heureux-Dube has served for fifteen years, and is the senior member of the court. She has been an outspoken supporter of equality for lesbians and gay men, and has played a significant role in a series of Canadian high court decisions that have pushed the legislatures at federal and state levels into extending a large degree of recognition to lesbian and gay families, as well as "reading in" to the Canadian charter of rights a ban on sexual orientation discrimination. The controversial justice caught flack for this as well as her positions on other issues. After she attended and spoke at an international legal conference on recognition for same-sex couples held in London in July 1999, there were calls in Canada for her resignation from the bench, which she stoutly resisted. Your editor, who also spoke at the conference, had an opportunity to meet the justice at that time and to hear her speak with passion about the ideal of equality for all people under the law. *The Globe and Mail*, May 2.

Jon Davidson, senior counsel in Lambda Legal's Western Regional Office, is the recipient of the fifth annual Distinguished Achievement Award given by the Monette/Horwitz Trust for his contributions to fighting homophobia as a Lambda attorney and for his work to educate the public about lesbian, gay, bisexual and transgender issues. The award is presented at the Lambda Literary Awards Banquet, held this year on May 2 in New York City. A.S.L.

AIDS & RELATED LEGAL NOTES

Supreme Court Fractures Over ADA Accommodation Dispute

The Supreme Court split five ways in a confusing April 29 ruling about the reasonable accommodation requirement in the Americans With Disabilities Act (ADA). Although two concurring justices joined with a three-member plurality expressly in order to make possible an opinion for the Court in *US Airways, Inc. v. Barnett*, 2002 WL 737494, it was clear from the separate opinions that both Justice Stevens and Justice O'Connor joined the opinion for the Court by Justice Breyer with misgivings. Justices Scalia and Thomas dissented from the right, while Justices Souter and Ginsburg dissented from the left. Chief Justice Rehnquist and Justice Kennedy made up the balance of the plurality in support of Breyer's opinion.

The issue before the Court was the relative weight to be given to an employer's seniority policy when it came into conflict with a proposed accommodation for an employee with a disability. In this case, Robert Barnett, who sustained an on-the-job back injury, had been

transferred to the mailroom temporarily to accommodate his disability, but lost his job when the normal bidding process gave priority to a more senior employee. Barnett argued that the statutory accommodation requirement should take priority over US Airways' unilaterally-adopted seniority policy. (The seniority policy in this case was not established through collective bargaining with a union.) US Airways argued that a neutral seniority policy should always take priority over an individual employee's request for an accommodation, citing the vested rights and expectations of other employees and the non-discriminatory application of a seniority rule. The district court granted summary judgment to the employer, relying on a string of federal circuit decisions that give seniority systems priority over ADA accommodation, but the 9th Circuit reversed, holding that the existence of a seniority system is only one factor to be weighed in determining whether a particular job assignment would create an undue hardship to the employer.

The Court came down somewhere between these two positions. Justice Breyer, closely

parsing the language of the statute, found that there is a multi-part analysis. First, an employee must be seeking a "reasonable accommodation." If the accommodation is reasonable, an employer could defeat the request by showing that it would impose an "undue burden." Breyer found that an accommodation that violates a neutral seniority system would be unreasonable in the "usual run of cases," so an employee seeking such an accommodation would have the additional burden of establishing reasonableness by showing, for example, that the seniority policy had not been strictly followed in the past, or admitted so many exceptions that one more would not really matter. Breyer reached this conclusion by noting the preferred position that seniority systems have enjoyed under other employment discrimination statutes, such as Title VII and ADEA (the Age Discrimination in Employment Act). In effect, Breyer maintained that the 9th Circuit erred by holding that a seniority system is just one among many factors to be considered in evaluating "undue hardship;" instead, according to Breyer, the seniority system issue arises

at the reasonableness stage of the inquiry, and absent a showing of special circumstances, an accommodation that would violate seniority rules would be presumptively unreasonable.

While acknowledging that all the cases he cited involved seniority systems embodied in legally-enforceable collective bargaining agreements between employers and unions, Breyer insisted that this made no difference, stating that “the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems.” Breyer pointed out that seniority systems provide “important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment.” Thus, they have the consequence of building employee loyalty to an employer, which would be lost if seniority were easily overridden to achieve other goals.

In his concurrence, Justice Stevens agreed that the seniority issue arises at the reasonableness stage of the analysis, but emphasized that the 9th Circuit had correctly rejected the district court’s *per se* “approach granting summary judgment to the employer, leaving open a possibility that the employee could prevail by showing that his particular accommodation was reasonable under the circumstances.

In her concurrence, Justice O’Connor focused on whether a seniority system is a “legally enforceable” policy of the employer, an issue not addressed in the lower courts in this case. She pointed out that employee expectations based on their seniority would be less well founded under an unenforceable policy that could be unilaterally withdrawn or modified by the employer. She pronounced herself “troubled by the Court’s reasoning,” but believed that her approach to the issue would usually lead to the same result, so concluded by stating “because I think it important that a majority of the Court agree on a rule when interpreting statutes, I join the Court’s opinion.”

Justice Scalia’s dissent argued that because a neutral seniority system does not discriminate based on an employee’s disability, employers would have no obligation in any case to grant an accommodation that requires a violation of the seniority system. In his view, the only accommodations required under the statute are to employer facilities or policies that directly discriminate based on disabilities.

Justice Souter’s dissent pointed out key distinctions between the other civil rights statutes and the ADA. In the other statutes, seniority systems are mentioned with approval, and employers are protected from liability for enforcing a bona fide seniority system, even though that might have a differential impact in a particular case on a basis otherwise prohibited under the law. By contrast, the ADA does not mention seniority systems at all, and the legislative history makes clear that Congress did not in-

tend that seniority systems override reasonable accommodations in the absence of a strong showing of undue hardship. The problem is that in its ADA jurisprudence, the Court has eschewed legislative history whenever it appears to a majority of the Court that the actual wording of the statute is inconsistent with the assertions about its effect found in committee reports and floor debate.

Souter noted that US Airways’ employee handbook specifically stated that it “is not intended to be a contract” and that “US Air reserves the right to change any and all of the stated policies and procedures in this Guide at any time, without advanced notice.” Making a point quite similar to O’Connor’s, Souter asserted: “In fact, it is hard to see the seniority scheme here as any match for Barnett’s ADA requests, since US Airways apparently took pains to ensure that its seniority rules raised no great expectations... [I]t is safe to say that the contract law of a number of jurisdictions would treat this disclaimer as fatal to any claim an employee might make to enforce the seniority policy over an employer’s contrary decision. With US Airways itself insisting that its seniority system was noncontractual and modifiable at will, there is no reason to think that Barnett’s accommodations would have resulted in anything more than minimal disruption to US Airways’s operations, if that.”

While the Court’s decision rejects the employer’s claim that a seniority system will always trump an accommodation request, it has clearly rejected Congress’s expressed intent (in the legislative history) that seniority systems be treated as less important under the ADA than they are under Title VII or ADEA. This means that employees in workplaces with seniority policies, whether collectively-bargained or unilaterally adopted by employers, will have a harder time in seeking an accommodation that involves a job transfer or reassignment, particularly younger persons whose accumulated seniority is not very great. As such, the decision could pose a barrier to people with HIV/AIDS who wish to work but need schedule or assignment modifications due to their condition. A.S.L.

Federal Court Rejects Treatment Claim by HIV+ Prisoner

In *Evans v. Bonner*, 2002 WL 463672 (U.S. Dist. Ct., E.D.N.Y. March 27), the court granted summary judgment to the defendants in a prisoner’s suit under 42 U.S.C. 1983 that alleged improper treatment of his HIV condition while he was in the Hudson Correctional Facility on Long Island, New York.

Lamont Evans filed a bare bones complaint alleging that, because he was not given his HIV medication in accordance with the strict time schedule which an HIV treatment regimen de-

mands, his viral load ballooned from 3,500 to 11,700, and that he suffered emotional distress as a result. The case proceeded against two nurse practitioners because all other defendants were dismissed previously.

Unfortunately for Evans, the record showed that while his viral load did balloon at one point, as stated in the complaint, prompt and timely action was taken to correct his condition. Evans’s medications were changed when the condition was discovered, and his viral load dropped to 775 within four months. The medical expert for the defense testified that timing of medication was not all that critical, that medication could be administered two to three hours off schedule with no ill effects. Indeed, treatment could be skipped for two or three weeks before ill effects would result. Evans could not rebut this witness.

The court found no malpractice at all, and ruled that, in any event, mere malpractice would be insufficient to support a constitutional violation under 42 U.S.C. Sec. 1983. Evans’ relief in that case would be a malpractice action in state court. The mere assertion of resulting pain was insufficient to state a cause of action under the circumstances. *Steven Kolodny*

HIV+ Prisoners Loses Suit on Work Duties

In *Georgetown v. Tran*, 2002 WL 818079 (E.D.La., April 25), U.S. District Court Judge Duval dismissed a challenge to a federal magistrate’s decision denying an HIV+ prisoner’s legal challenge to his work classification.

Walter Georgetown is confined in an institution operated by Washington Correction Employees. He is positive for hepatitis C and HIV. The prison doctor, Dr. Quyen Tran, aware of his medical condition, assigned him to the work duty status of “regular duty with restrictions,” which meant that he was assigned to the same field work as other prisoners, but was excluded from any participation in contact sports, kitchen duty, or weightlifting. Georgetown objected to this classification, arguing on the one hand that field duty exacerbated his medical condition, mainly due to prolonged sun exposure, and that there was no good reason to exclude him from participation in sports or weightlifting, or assigning him to kitchen duty rather than field duty.

Judge Duval rejected his arguments on all counts. Although it is true that the prisoner’s private physician had indicated that he should avoid prolonged exposure to sunlight, it seems that Dr. Tran eventually did reclassify him for “inside” work, a few months afterwards. The court found that there was no evidence that the prisoner’s medical conditions worsened during the time he was assigned to field duty, and in light of the great difference that courts accord to prison medical decision-making, Duval rejected both constitutional and ADA claims.

Also, Duval found that the federal court should not second-guess prison officials' decisions to place restrictions on inmates infected with HBV and HIV. "There has been no evidence that plaintiff's restriction from participation in contact sports or weightlifting stemmed from anything but his physicians' medical opinion that those activities were not conducive with his medical condition," wrote Duval. "Certainly there has been no proof that plaintiff's physicians had any discriminatory intent or purpose in placing those restrictions on plaintiff."

As to the exclusion from kitchen duty, Duval referred to a prior decision by the 9th Circuit upholding such an exclusion on the grounds that other prisoners might be alarmed to learn that their food was being prepared by somebody who carried communicable diseases, thus making the exclusion well within the reasonable deference of prison authorities, even if the medical evidence showed scant risk of transmission through food handling. A.S.L.

Court Awards New Trial to Chiropractor Accused of AIDS Quackery

Dr. Gary F. Edwards, a chiropractor, treated an HIV+ patient, Duane Troyer, using a strange electronic invention called the Interro. The Interro allegedly analyzed the patient, then produced a liquid dietary supplement specifically matching the patient's nutritional needs. Edwards also prescribed other herbal and vitamin supplements. A dispute arose over whether Edwards had claimed that he could treat Troyer and rid him of HIV. His assurances of a cure allegedly led Troyer, a hemophiliac, and his wife, Regina, to engage in unprotected sex, causing Regina to become infected with HIV and to give birth to an HIV+ baby, Sara. The Missouri State Board of Chiropractic Examiners revoked Edwards' license based on the allegations of Regina and her mother, and Dr. Edwards challenged the revocation. *Edwards v. Missouri State Board of Chiropractic Examiners*, 2002 WL 553482 (Mo. App. W.D. April 16, 2002).

Edwards' challenge was based on his being barred from discovering (1) information impeaching the credibility of a witness against him, Mrs. Troyer, and (2) expert opinion provided by the Chiropractic Board's witness, Dr. Thomas Duke. Edwards denied having claimed a cure for Troyer's HIV. Troyer's father agreed with Dr. Edwards.

Duane and Regina married in September 1989 knowing that Duane was HIV+, and that they could engage only in protected sex. Duane elected not to be treated with AZT. Upon the recommendation of his father, he received treatment from Dr. Edwards, whose Interro had the reputed ability to diagnose and treat any disease. The Interro worked by Edwards' dipping a probe, connected to the machine, into water, then touching it to Troyer's fingers, gen-

erating a reading on a bar graph on a computer screen. The scale ran from 1 to 100; when it registered 50, one's body was "in balance" and cured. The machine assisted Edwards in prescribing dietary supplements, and Interro itself produced liquid drops to balance the patient's body chemistry. Edwards charged various amounts for his services and supplements. The Troysers practiced safe sex until, one year after marriage, Dr. Edwards allegedly pronounced Duane HIV-free. The Troysers started having sex without protection, leading to the infection of Regina and the birth of HIV-infected Sara in May 1992. Duane died of complications from AIDS in September 1992.

Dr. Edwards maintained that he never told Duane, Regina, or Regina's mother, Elizabeth Hershberger, that he could treat or eliminate HIV, or that Duane's HIV had been eradicated. Duane's father, David Troyer, backed up the doctor. Edwards' records show that he only treated Duane "to help strengthen immune system for fight against possible AIDS." He used the Interro merely to establish a baseline and measure progress. When Duane showed AIDS-like symptoms and Dr. Edwards performed a blood test, he claims that he affirmed that Duane was still HIV+, and promptly informed Duane, Regina, and David.

The Administrative Hearing Commission (AHC), a unit of the Chiropractic Board, found Regina and Elizabeth's testimony on Edwards' actions and advice to be credible. The AHC charged (1) that Edwards displayed incompetency, and engaged in misconduct, fraud, misrepresentation and dishonesty; (2) that his claims to be able to treat and cure HIV were highly unprofessional and improper; (3) that he obtained fees by fraud, deception and misrepresentation, and violated the professional trust and confidence placed in him; and (4) that by prescribing or administering medicine, Edwards had attempted to practice medicine, which a chiropractor is not permitted to do.

A trial court upheld the Board's decision. The appellate court reviewed the decisions of the AHC and Chiropractic Board, as well as that of the trial court. The appellate court first ruled that a party in a licensing case may obtain discovery in the same manner as that provided for discovery in civil actions. The party may obtain all materials that may contain evidence useful for the proceedings.

Entries in Regina's diaries were ruled, after in camera review, to be irrelevant, and properly omitted from the scope of discovery. However, Regina's statements from previous litigation involving HIV-contaminated blood factor concentrate were relevant and should have been admitted. Regina had filed three claims in the earlier litigation and had received a \$300,000 settlement. Edwards wanted to discover whether, in that litigation, Regina made assertions about how she and Sara contracted HIV. If

she had testified that Dr. Edwards had caused them to become infected, Edwards' advice would have been an intervening cause that might have reduced or eliminated the settlement. It appeared to Dr. Edwards that Regina did not mention his treatment of Duane. If Regina made claims in the prior litigation inconsistent with those made in the current litigation, those claims were relevant as they might undermine her credibility. Edwards had a right to discover these statements or claims. Edwards also had the right to discover letters from the Chiropractic Board's attorney to Dr. Thomas Duke, its testifying expert. Rules provide that a party may discover facts known and opinions held by experts retained for litigation. Even though the letters contained trial preparation materials and opinion work product, if Dr. Duke reviewed them in forming his opinions, they were discoverable. The discovery of facts known to and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert. Once the expert is designated, however, such materials are available for discovery. The case was sent back to trial court. *Alan J. Jacobs*

AIDS Law Litigation Notes

Washington State — The Court of Appeals of Washington ruled in *State v. France*, 2002 WL 490817 (Wash. App., Div. 2, March 29) (unpublished disposition), that when Jesse John France pled guilty to two counts of possession of methamphetamine, he should not have been ordered by the court to submit to an HIV test. The statute authorizing such testing for convicted defendants in drug cases requires that the drug-related offense "is one associated with the use of hypodermic needles" in order for testing to be authorized. Since the trial court never made a specific finding to such effect in this case, the order for HIV-testing had to be quashed.

U.S. Tax Court — *AIDS Policy & Law* reports that the U.S. Tax Court ruled on April 1 that HIV infection is not a disability for purposes of provisions authorizing tax-free withdrawals from Individual Retirement Accounts by disabled persons. The court found that a \$38,855 withdrawal that Gregory Scott West made from his IRA account in 1997 was subject to the ten percent tax on early withdrawals, when he quit his job due to declining health. West claimed he was not tested for HIV and did not seek medical attention until 1998 because until then he did not have a job that provided uncapped medical coverage, and that he sought to delay treatment as long as possible to avoid creating drug resistance too early. The Code's treatment of disability turns on employability, and West was clearly employable at the time he withdrew the money. *West v. Commissioner of Internal Revenue*, No. 2784-00S. A.S.L.

AIDS Law & Society Notes

The midwest was shaken by the report that an 18-year old college basketball player had been arrested for spreading HIV. Nikko Briteramos, of Si Tanka Huron University in Huron, South Dakota, was arrested late in April on charges of knowingly exposing several women to HIV through unprotected sex. Briteramos learned he was HIV+ in March when he attempted to donate blood. Authorities reported that at least four people in the community have tested positive with potential links back to Briteramos, and a local judge denied a bail request on the grounds that he might pose a danger to the community. Acquaintances of Briteramos at the University expressed astonishment that the laid-back, clean-cut freshman could be capable of spreading HIV. After the news of Briteramos's arrest broke in national media, police indicated that they have arrested two other men for spreading HIV, a couple living in Aberdeen, James Lee Woods and William Kenneth Jenigen, each of whom is charged with exposing others to HIV through sexual activity. *New York Times*, May 1&3; *Los Angeles Times*, April 30.

Florida Governor Jeb Bush signed into law a measure intended to require courts to reveal to victims the result of HIV tests ordered for sexual assault criminal defendants within two

weeks after the court receives the results, and also provides that such tests must be ordered, regardless of whether body fluids were exchanged, if the victim is a child or a disabled adult. *Miami Herald*, April 23. A.S.L.

International AIDS Notes

World Health Organization — On April 22, the World Health Organization released new treatment guidelines for AIDS, meant to provide information to doctors in poor areas about how to safely prescribe the current generation of effective HIV treatments. WHO also added new drugs to its "essential drugs list" to encourage price competition between patent-based and generic companies. The WHO step was intended to help HIV advocates in the ongoing struggle to get governments to recognize and make available effective treatments. *New York Times*, April 23.

South Africa — During April, it appeared that the government of President Thabo Mbeki was finally changing its tune about AIDS. In an interview published on April 24, Mbeki was quoted as advocating public health measures to education people about viral transmission, and the previous week the cabinet issued a statement that it would be making policy based on the "premise" that HIV causes AIDS, a major

turnabout for Mbeki. The cabinet reversed a ban on giving anti-retroviral drug treatment to rape victims, and appears willing now to comply with requirements to provide treatment for pregnant women. *Wall Street Journal*, April 25; *New York Times*, April 20; *Associated Press*, April 18.

Canada — The *Kitchener-Waterloo Record* reported on April 19 that James Wakeford, a person with AIDS who seeks medical help to terminate his life, struck out with Canada's Supreme Court, which refused to review a lower court decision upholding a law forbidding such medically-assisted suicides. The newspaper reported that in 1993, by a 5-4 vote, the Court had upheld the law in a "contentious case" involving a woman suffering from ALS. Despite the Court's holding in that case, the woman did end her life the following year with the aid of an anonymous doctor.

India — *The Hindu* reported on April 3 that the Indian cabinet had approved a new national policy on prevention and control of HIV and on blood transfusion services. The policy addresses human rights issues for people affected by the epidemic. The Union Health Ministry estimates that 3.86 million Indians are infected with HIV, and that the prevalence rate in the general population is more than one percent in six of the Indian states. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Human Rights Campaign (HRC) seeks a staff counsel to join its busy legal department on Aug. 1, 2002. Counsel will join two other attorneys, a paralegal and law fellows, and a network of outside counsel, in advising all HRC legislative, regulatory, judicial, educational and corporate client areas. Primary duties will include providing legal research and analysis to state and federal legislative advocacy and web-based HRC FamilyNet and HRC WorkNet programs, engaging in judicial nominations research and advocacy, collaborating with HRC lobbyists, field staff and coalition allies on policy initiatives, handling corporate legal matters and helping supervise law fellows program. A J.D. degree is required. Applicants must have outstanding research, writing and interpersonal skills, a strong academic record, political savvy, and the ability to work in a fast-paced legal department. One to three years of experience in legislative lawyering strongly preferred, but outstanding entry-level candidates will also be considered. Competitive salary and benefits package. Applicants should submit cover letter, resume, law school transcript and brief writing sample ASAP to: Anthony E. Varona, General Counsel and Legal Director, HRC, 919 18th Street, NW, Washington, DC 20006. EOE: Applications from women, peo-

ple of color and other underrepresented minorities are strongly encouraged.

Legal Conference Announcement The AIDS Network in Madison Wisconsin and the Young Lawyers Division of the Wisconsin State Bar will present an HIV/AIDS Law Roundtable at the Marquette University Law School Alumni Memorial Union in Milwaukee on May 31 from 9 am to 3 pm. For information about agenda and attendance, inquire of the Madison AIDS Network office at 608-252-6540, or info@madisonaidsnetwork.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Adcock, Thomas, *Pro Bono Estate Planning is Difficult but Rewarding: Clients With AIDS Running Out of Time*, NY Law Journal, April 12, 2002.

Belkin, Aaron, *Breaking Rank: Military Homophobia and the Production of Queer Practices and Identities*, 3 Georgetown J. Gender & L. 83 (Fall 2001).

Bible, Jon D., *Same-Sex Sexual Harassment: When Does a Harasser Act "Because of Sex"?*, 53 Labor L. J. 3 (Spring 2002).

Boyle, Kevin, *Hate Speech — The United States Versus the Rest of the World?*, 53 Maine L. Rev. 487 (2001).

Cain, Patricia A., *Dependency, Taxes, and Alternative Families*, 5 J. Gender, Race & Justice 267 (Spring 2002).

Carlson, Richard R., *Romantic Relationships Between Professors and Their Students: Morality, Ethics and Law*, 42 S. Tex. L. Rev. 493 (Spring 2001).

Dolgin, Janet L., *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 Columbia L. Rev. 337 (March 2002).

Durden, Stephen, *Nude Entertainment Zoning*, 12 Seton Hall Const. L. J. 119 (Fall 2001).

Eskridge, William N., Jr., *January 27, 1961: The Birth of Gaylegal Equality Arguments*, 58 N.Y.U. Ann. Survey of Amer. L. 39 (2001) (Essay about Dr. Frank Kameny's pro se Supreme Court cert. petition protesting his discharge from federal service).

Friedman, Lawrence, and Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 Boston Coll. L. Rev. 125 (Dec. 2001) (Baker v. State is the Vermont same-sex marriage case).

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Franklin, Kris, *The Rhetorics of Legal Authority Constructing Authoritativeness, the*

"Ellen Effect," and the Example of Sodomy Law, 33 Rutgers L. J. 49 (Fall 2001).

Goldberg-Hiller, Jonathan, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Univ. Of Mich. Press, 2002) (ISBN 0-472-11223-6).

Hong, Kari I., *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 Col. J. Gender & L. 88 (2002).

Huffer, Lynne, "There is no Gomorrah": Narrative Ethics in Feminist and Queer Theory, 12 Differences No. 3, 1 (Fall 2001).

Koppelman, Andrew, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. Rev. 519 (Dec. 2001).

Koppelman, Andrew, *On the Moral Foundations of Legal Expressivism*, 60 Md. L. Rev. 777 (2001).

Koppelman, Andrew, *Secular Purpose*, 88 Virginia L. Rev. 87 (March 2002) (considering constitutional arguments against laws that have religious roots).

Lucey, Michael, *Sexuality, Politicization, May 1968: Situating Christiane Rochefort's Printemps au parking*, 12 Differences No. 3, 33 (Fall 2001).

Marrus, Ellen, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-Troxel?*, 43 Arizona L. Rev. 751 (2001).

McDonald, Alex C., *Dissemination of Harmful Matter to Minors Over the Internet*, 12 Seton Hall Const. L. J. 163 (Fall 2001).

Momberger, Karla, *Breeder at Law*, 11 Col. J. Gender & L. 127 (2002).

Pachter, Adam, *A Talk by Adam Pachter: Sexual Orientation and the Military*, 3 Georgetown J. Gender & L. 127 (Fall 2001) (transcript from symposium).

Rose, Katrina C., *Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality*, 70 UMKC L. Rev. 257 (Winter 2001) (Unfortunately, celebrating too soon; subsequently the Kansas Supreme Court embraced Texas simplicity...).

Rubinfeld, Jed, *The Anti-Antidiscrimination Agenda*, 111 Yale L. J. 1141 (March 2002).

Sheldon, John C., *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 Maine L. Rev. 523 (2001).

Sherman, Jeffrey G., *Domestic Partnership and ERISA Preemption*, 76 Tulane L. Rev. 373 (Dec. 2001).

Skafish, Bradley A., *Smut on the Small Screen: The Future of Cable-Based Adult Entertainment Following United States v. Playboy Entertainment Group*, 54 Fed. Communications L. J. 319 (March 2002).

Sobel, Stacey, *A Talk by Stacey Sobel: Sexual Orientation and the Military*, 3 Georgetown J.

Gender & L. 135 (Fall 2001) (transcript from symposium).

Stein, Edward, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471 (Dec. 2001).

Williams, Robert F., *Old Constitutions and New Issues: National Lessons From Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 Boston Coll. L. Rev. 73 (Dec. 2001).

Yoshino, Kenji, *Covering*, 111 Yale L.J. 769 (Jan. 2002) (extended theoretical argument about the nature of lesbian and gay discrimination).

Student Articles:

Edelson, Daniel, *The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation*, 25 Fordham Int'l L. J. 483 (Dec. 2001).

Fetty, Jeremy L., *A "Fertile" Question: Are Contracts Regarding the Disposition of Frozen Preembryos Worth the Paper Upon Which They Are Written?*, 2001 L. Rev. of Mich. State U. Detroit Coll. L. 1001.

Gladowsky, Alison R., *Has the Computer Revolution Placed Our Children in Danger? A Closer Look at the Child Pornography Prevention Act of 1996*, 8 Cardozo Women's L. J. 21 (2001) (note case reported above on unconstitutionality of said act).

Haun, Pamela A., *The Marital Privilege in the Twenty-First Century*, 32 U. Memphis L. Rev. 137 (Fall 2001).

Kane, Arielle D., *Sticks and Stones: How Words Can Hurt*, 48 Boston Coll. L. Rev. 159 (Dec. 2001).

Landau, Brent W., *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 Harv. J. on Legis. 169 (Winter 2002).

Martin, James H., *The Ninth Circuit's Review of Administrative Questions of Law in the Immigration Context: How the Court in Hernandez-Montiel v. INS Ignored Chevron and Failed to Bring Harmony to "Particular Social Group" Analysis*, 10 Geo. Mason L. Rev. 159 (Fall 2001).

McGuire, Daniel E., *The Supreme Court's Latest Resolution of the Conflict Between Freedom of Association and Public Accommodations Laws: Boy Scouts of America v. Dale and Its Implications In and Out of the Courtroom*, 47 Villanova L. Rev. 387 (2002).

Oleksy, Rebecca A., *Student-on-Student Sexual Harassment: Preventing a National Problem on a Local Level*, 32 Seton Hall L. Rev. 230 (2001).

Tallant, Kevin, *My "Dude Looks Like a Lady": The Constitutional Void of Transsexual Marriage*, 36 Georgia L. Rev. 635 (Winter 2002).

Taylor, Emily, *Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws*, 28 Ohio Northern Univ. L. Rev. 171 (2001).

Tiosavljevic, Belinda, *A Field Day for Child Pornographers and Pedophiles if the Ninth Circuit Gets Its Way: Striking Down the Constitutional and Necessary Child Pornography Prevention Act of 1996*: Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), 42 S. Tex. L. Rev. 545 (Spring 2001) (The field day has arrived... see above.)

Specially Noted:

Vol. 58, No. 1, of the *NYU Annual Survey of American Law* is a tribute issue in honor of Norman Dorsen, NYU professor and past president of the American Civil Liberties Union. It was during his presidency that the ACLU established its Lesbian & Gay Rights and AIDS & Civil Liberties Projects. In addition to the article by William Eskridge noted above, several other articles in this issue make passing mention of lesbian and gay legal issues.

Vol. 4, No. 2, of the *University of Pennsylvania Journal of Constitutional Law* is a symposium on the topic "Equal Protection After the Rational Basis Era: Is It Time to Reassess the Current Standards of Review?" Although there is only fleeting mention of gay rights in a few of the articles (and a brief mention of an ACT-UP demonstration in the context of a discussion of religious discrimination), this symposium may be of general interest to those concerned about the future development of Equal Protection doctrine as it relates to discrimination claims by sexual minorities.

Vol. 3, No. 1 of the *Georgetown Journal of Gender and the Law* (Fall 2001) is a symposium on gender and the military, including several articles specifically address sexual orientation issues, noted separately above.

AIDS & RELATED LEGAL ISSUES:

Chalmers, James, *Sexually Transmitted Diseases and the Criminal Law*, *Juridical Rev.*, 2001: Part 5, 259.

Edmonds, Curtis D., *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans With Disabilities Act*, 33 Texas Tech L. Rev. 321 (2002).

Gill, Bates, Jennifer Chang, and Sarah Palmer, *China's HIV Crisis*, 81 Foreign Affairs No. 2, 96 (March/April 2002).

Marsh, Andrea, *Testing Pregnant Women and Newborns for HIV: Legal and Ethical Responses to Public Health Efforts to Prevent Pediatric AIDS*, 13 Yale J. L. & Feminism 195 (2001).

Russell, Michael L., *The Americans With Disabilities Act and the Eleventh Amendment: Do States Have a License to Discriminate?*, 28 Ohio Northern Univ. L. Rev. 133 (2001).

Student Articles:

Ayers, Leslie, *Is Mama a Criminal? An Analysis of Potential Criminal Liability of HIV-Infected Pregnant Women in the Context of Mandated Drug Therapy*, 50 Drake L. Rev. 293 (2002).

Barber, Nathan J., "Upside Down and Backwards": *The ADA's Direct Threat Defense and the Meaning of a Qualified Individual After Echazabal v. Chevron*, 23 Berkeley J. of Emp. & Lab. L. 149 (2002).

Bass, Naomi A., *Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 Geo. Washington Int'l L. Rev. 191 (2002).

Bombach, Kara M., *Can South Africa Fight AIDS? Reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement*, 19 Boston U. Int'l L. J. 273 (Fall 2001).

Farr, Emily, *United States v. Oakland Cannabis Buyers' Cooperative: The Medical Necessity Defense as an Exception to the Controlled Substances Act*, 53 S. Carolina L. Rev. 439 (Winter 2002).

Kaplan, Adam B., *Father Doesn't Always Know Best: Rejecting Paternalistic Expansion of the "Direct Threat" Defense to Claims Under the Americans With Disabilities Act*, 106 Dickinson L. Rev. 389 (Fall 2001).

LeVar, Thad, *Why an Employer Does Not Have to Answer for Preventing an Employee with a Disability from Utilizing Corrective Measures: The Relationship Between Mitigation and Reasonable Accommodation*, 16 BYU J. of Public L. 69 (2001).

Park, Rosalyn S., *The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients*, 11 Minn. J. of Global Trade 125 (Winter 2002).

Shinavski, Joan, *The Eleventh Amendment Bars Private Individuals from Suing State Em-*

ployers for Money Damages Under Title I of the Americans With Disabilities Act: Board of Trustees of the University of Alabama v. Garrett, 40 Duquesne L. Rev. 161 (Fall 2001).

Specially Noted:

Vol. 27, No. 1 (Feb. 2002) of the *Journal of Health Politics, Policy and Law* contains an extensive book review section that discusses 5 books on AIDS policy issues.

EDITOR'S NOTE:

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the Le-GaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.